Supreme Court, U.S.
FILED
NOV 18 1998
OFFICE OF THE CLERK

No. 98 835

In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ET AL., PETITIONERS

v.

RAUL PERCIRA GONCALVES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

DONALD E. KEENER
LINDA S. WENDTLAND
EDWARD J. DUFFY
LORRI L. SHEALY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202)514-2217

TABLE OF CONTENTS

	Page
Appendix A (court of appeals' opinion, May 15, 1998)	1a
Appendix B (order of the immigration judge, Jan. 20, 1995)	59a
Appendix C (oral decision of the immigration judge, Jan. 20, 1995)	62a
Appendix D (decision of the Board of Immigration Appeals, Mar. 24, 1997)	73a
Appendix E (memorandum order of the district court, August 14, 1997)	75a
Appendix F (order of dismissal of the district court, August 14, 1997)	78a
Appendix G (court of appeals' order denying rehearing, July 31, 1998)	79a
Appendix H (constitutional and statutory provisions involved)	81a
Appendix I (decision of Board of Immigration Appeals in *In re Soriano*, June 27, 1996)	91a
Appendix J (order of Attorney General vacating BIA decision in *In re Soriano*, Sept. 12, 1996)	124a
Appendix K (decision of the Attorney General in *In re Soriano*, Feb. 21, 1997)	125a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1953

RAUL PEREIRA GONCALVES, PETITIONER, APPELLANT

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES; DORIS MEISSNER, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE; STEVE FARQUHARSON, INS DISTRICT DIRECTOR, BOSTON DISTRICT; DEPARTMENT OF JUSTICE; AND IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENTS, APPELLEES

[Heard: Jan. 9, 1998
Decided: May 15, 1998]

Before: STAHL, Circuit Judge, CAMPBELL, Senior Circuit Judge, and LYNCH, Circuit Judge.

LYNCH, Circuit Judge.

Raul Goncalves has been a permanent resident alien for twenty-five years, ever since he arrived in the United States at the age of three, and now is subject to deportation because he has committed crimes of moral turpitude such as theft, possession of marijuana and the like. He filed an application in 1994 for discretionary relief from deportation with the immigration authori-

ties under § 212(c) of the Immigration and Nationality Act (INA), as the law permitted him to do.

While Goncalves' application was still pending, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), which, at § 440(d), restricted the availability of discretionary relief. The question then arose as to whether Congress intended these restrictions to apply retroactively. The Board of Immigration Appeals (BIA) said that Congress did not intend the restrictions to be fully retroactive, and that at least those aliens whose applications were pending on the date of AEDPA's enactment, like Goncalves, could continue to pursue their applications for relief. The Attorney General disagreed, reversed the BIA, and required the dismissal of all pending applications for § 212(c) relief (even appeals from cases where immigration judges had said relief should be granted). As a result, Goncalves' application was dismissed without being heard by the BIA and he was taken into custody by federal officials.

Goncalves filed a petition for habeas corpus in the district court, rather than filing for direct review in this court. This he was required to do by the precedent of this court. *See Kolster v. INS*, 101 F.3d 785 (1st Cir. 1996). The district court dismissed the petition, finding the Attorney General, and not the BIA, was correct in the interpretation of the statute.

Goncalves appealed, raising pure issues of law, including a challenge to the Attorney General's interpretation of the statute and constitutional claims. The Attorney General defends on two fronts. Goncalves

filed in the wrong court, she says. He should have filed in the court of appeals, he missed the deadline to do so, and so the case must be dismissed. In fact, she says, Congress sub silentio stripped the district courts of their traditional habeas jurisdiction under 28 U.S.C. § 2241 to hear claims of the type Goncalves asserts. Secondly, she says, no court may review her decision as to whether Congress intended the restrictions in AEDPA § 440(d) to apply to pending applications. Congress exempted her decision from any judicial review when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104-208, Div. C., 110 Stat. 3009-546 (enacted Sept. 30, 1996). In any event, she argues, her decision is entitled to deference. We find the Attorney General's arguments unpersuasive and agree that Goncalves may still pursue his claim for § 212(c) relief. We reverse and remand this case to the BIA.

A summary of our reasoning may be helpful. This case presents two sets of major issues. The first is which federal court, if any, has jurisdiction to hear Goncalves' claims. We conclude that Congress has divested the United States Courts of Appeals of their former statutory jurisdiction to hear such cases on direct review of the administrative agency's decision. We further conclude, following *Felker v. Turpin*, 518 U.S. 651, 116 S. Ct. 2333, 135 L.Ed.2d 827 (1996), that Congress neither explicitly nor by implication repealed the grant of jurisdiction in 28 U.S.C. § 2241 to issue writs of habeas corpus to persons in federal custody which the federal district courts have had since 1789 and which has always been available in immigration cases.

If there is jurisdiction, we ask whether Congress intended nevertheless to restrict the scope of review to preclude review of Goncalves' claims. To the extent that Congress intended to narrow the scope of review of discretionary decisions by the administrative agency, we note that this case does not involve any such exercise of discretion, but rather concerns a pure issue of law. That pure issue of law, of whether Congress intended to make a particular provision of a statute retroactive, is of a type traditionally resolved by the courts. We discern no intent by Congress to restrict the scope of judicial review of that question. Our conclusion avoids the need to reach novel and complex constitutional issues under the Suspension Clause, Article III, the Due Process Clause and the Equal Protection Clause.

The second major set of issues addresses the merits: is the Attorney General correct in her interpretation that AEDPA § 440(d), as amended by IIRIRA, eliminates eligibility for § 212(c) relief retroactively for aliens convicted of crimes involving moral turpitude? We analyze the question under *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483, 128 L.Ed.2d 229 (1994), and *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S. Ct. 1871, 138 L.Ed.2d 135 (1997), cases concerning the temporal application of new statutes. We conclude, contrary to the Attorney General, that Congress did not intend its new provisions restricting such discretionary relief to apply retroactively. The statute's text reveals numerous instances where Congress used explicit language to make its new restrictions apply retroactively; for example, it used such language with respect to alien terrorists. But

there is no such explicit text as to aliens in Goncalves' position.

We check our interpretation of the text against the legislative history to ensure we have not gone astray. That history shows three things. First, Congress expressly considered a provision which would have explicitly made the new restrictions on § 212(c) relief applicable retroactively and chose not to enact that provision. Second, Congress was keenly aware of the problem of whether restrictions on relief should apply retroactively. Third, Congress enacted IIRIRA against the backdrop of an administrative ruling by the BIA that the restrictions on § 212(c) relief for aliens convicted of crimes involving moral turpitude, contained in AEDPA § 440(d), was not fully retroactive and did *not* apply to pending applications. In the face of that ruling, the same Congress that had enacted AEDPA chose, in IIRIRA, not to amend AEDPA explicitly to provide that the AEDPA § 440(d) restrictions applied retroactively. It made that choice even though, in IIRIRA § 306, it amended AEDPA § 440(d), the very subsection at issue, in other respects. We therefore conclude that the BIA is required to *consider* Goncalves' application for § 212(c) relief from deportation. Whether the immigration authorities grant or deny that application, is, of course, within their discretion.

I. Facts and Procedural History

Raul Percira Goncalves is a lawful permanent resident of the United States. He committed a series of thefts, he says while under the influence of alcohol, and was incarcerated. He has been convicted of charges of breaking and entering, larceny, possessing burglary

tools, receiving stolen property, and one charge of possession of marijuana. Those non-violent offenses, Goncalves conceded, are crimes "involving moral turpitude" and subjected him to deportation. *See* Immigration and Nationality Act (old INA) § 241(a)(2)(A)(ii), House Judiciary Comm. Print, 104th Cong., 1st Sess. (10th ed.1995) (reflecting laws enacted as of May 1, 1995), now renumbered as INA § 237(a)(2)(A)(ii) and codified at 8 U.S.C.A. § 1227(a)(2)(A)(ii) (West Supp. 1998)[1] ("Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct . . . is deportable."). On his release from prison in May of 1994, he was taken into custody for deportation, although he was released on bail while his petition was pending before the INS. In the interim he attended meetings of Alcoholics Anonymous. He has since earned his high school equivalency diploma, married, had a child, and been gainfully employed.

At the time the deportation proceedings against him commenced, Goncalves was eligible to apply to the Attorney General for a discretionary waiver of deportation. That is because he was a lawful permanent resident, had seven years of "lawfully unrelinquished domicile" and the crimes he committed were not "aggravated" felonies. *See* old INA § 212(c); *see also*

---

[1] Citation to "INA" refers to the INA as currently in effect, whether or not the specific provision has been changed by AEDPA or IIRIRA. For ease of reference, we provide parallel citations to the current version of the United States Code Annotated. Citation to "old INA" refers to the INA as in effect on May 1, 1995, as set forth in the tenth edition of House Judiciary Committee's publication of the statute, i.e., as in effect prior to the amendments wrought by AEDPA and IIRIRA.

Francis v. INS, 532 F.2d 268 (2d Cir. 1976) (§ 212(c) relief is available in deportation as well as exclusion proceedings); *Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976) (adopting *Francis* decision nationwide). He had no right to remain in this country, but he was entitled by § 212(c) to apply for a waiver of deportation and ask the Attorney General, in the exercise of her discretion, to allow him to remain here.

Goncalves applied for § 212(c) relief in September 1994. Under the law in effect in 1994, an alien applying for a waiver first presented his case to an Immigration Judge (IJ), as Administrative Law Judges are known in the INS's Executive Office for Immigration Review. The IJ was required to balance the positive and adverse factors in determining whether a waiver was warranted, and to justify his or her decision, whether in favor or against granting a waiver, to allow review by the BIA and the courts. *See Matter of Marin*, 16 I. & N. Dec. 581, 585, 1978 WL 36472 (BIA 1978) (listing factors). The IJ agreed that Goncalves was statutorily eligible to apply for § 212(c) relief but Goncalves failed to convince the IJ that he was worthy of it. On Jan. 20, 1995 the IJ denied his application and Goncalves took a timely appeal. And there the case sat for more than two years, undoubtedly because of the very large number of cases that were pending before the Board. *See* H.R. Rep. No. 104-469, pt. 1, at 119 (1996) (noting that over 17,000 aliens filed appeals to the BIA in 1995).

The BIA never reached the merits of Goncalves' application. On March 24, 1997, the BIA dismissed Goncalves' appeal on the grounds that he was no longer statutorily eligible for § 212(c) relief, as a result of enactment of AEDPA in the interim. The BIA was

compelled to do so by the decision of the Attorney General in *Matter of Soriano*, Int. Dec. 3289, 1996 WL 426888 (Op. Att'y Gen. June 27, 1996) (beginning at *16). The Attorney General's decision in *Soriano* concluded that Congress intended to make the new restrictions on § 212(c) relief contained in AEDPA § 440(d) retroactive and that the new restrictions should be applied even to those applications filed before the date of AEDPA's enactment. *Soriano* required the dismissal of all such pending applications, even if the alien's application had been granted by the IJ and the case was pending on appeal. The Attorney General's *Soriano* decision reversed an earlier opinion by the BIA, sitting en banc, that found no congressional intent to apply the new restrictions to pending applications, and so would have permitted Goncalves' appeal to be heard on the merits.

Because his application had been dismissed, Goncalves was taken back into federal custody on June 25, 1997 for deportation. On August 8, 1997, Goncalves filed a petition for habeas corpus relief in the United States District Court for the District of Massachusetts. Goncalves' petition asserted that Congress did not intend AEDPA § 440(d) to apply retroactively, or at the very least that Congress did not intend to disrupt pending applications for relief. Goncalves also challenged, as a violation of the Equal Protection Clause, the government's decision to apply the statutes in a manner which made the availability of discretionary relief dependent on whether an alien was in deportation proceedings, as Goncalves was, or in exclusion proceedings, as Goncalves would have been if he had taken

a brief trip abroad.[2] The district court dismissed Goncalves' petition for a writ of habeas corpus on August 14, 1997. On August 26, 1997, this court granted Goncalves' motion to stay deportation and for expedited consideration of his appeal. Goncalves has been in federal custody since June 25, 1997. He was thus in custody when his petition was filed and has apparently remained in custody throughout these habeas proceedings.

II. Statutory Background

In order to understand the issues presented by this case, we outline some of the recent changes to our immigration laws. In the interim two years between the IJ's denial of Goncalves' application for a discretionary waiver of deportation and the BIA's dismissal of his application, Congress substantially altered the immigration landscape by enacting two significant statutes, AEDPA and IIRIRA.

On April 24, 1996, Congress enacted AEDPA, which, at § 440(d), greatly expanded the category of criminal convictions that would render an alien ineligible to

---

[2] The BIA has interpreted AEDPA § 440(d) as precluding relief only in deportation proceedings, not in exclusion proceedings. *See Matter of Fuentes-Campos*, Int. Dec. 3318, 1997 WL 269368 (BIA May 14, 1997). Although IIRIRA has abolished this distinction by combining the two into a new proceeding known as a "removal proceeding," this change does not affect aliens subject to the "transitional rules." Relying on *Francis*, *supra*, Goncalves argues that there is no rational basis for making the availability of discretionary relief depend on the distinction between these two forms of proceedings. We express no view on the merits of this argument.

apply for § 212(c) relief. Although AEDPA § 440 contained an express "effective date" provision, that provision by its terms applied only to § 440(e) (expanding INA definition of "aggravated felony"), and not to § 440(d), the subsection which concerns us.

Additionally, AEDPA § 440(a) eliminated statutory review pursuant to the APA in the U.S. Courts of Appeals for some categories of deportation cases. In cases involving denial of an application for discretionary waiver by an alien deportable by reason of commission of aggravated felonies, this court held in *Kolster*, *supra*, that Congress had eliminated the statutory grant of jurisdiction in the courts of appeals over such claims. *Kolster* also held that this posed no constitutional problems because residual jurisdiction existed in the district courts over habeas corpus petitions. That holding was consistent with the position taken by the INS; indeed, the INS conceded that there would be some form of habeas jurisdiction in the district court. *Kolster* expressly reserved issues concerning the source of this habeas jurisdiction and the scope of habeas review. *See id.* at 790 n. 4 & 791. It was in apparent reliance on the *Kolster* case and this court's subsequent decision in *Santos v. INS*, 124 F.3d 64 (1st Cir. 1997) (rejecting INS claim that, after passage of IIRIRA, petition for review in court of appeals, rather than petition for a writ of habeas corpus, was the proper forum to raise a jurisdictional or constitutional challenge to an order of deportation), that Goncalves filed his petition for habeas corpus in the district court.

Within a short time Congress changed some of the rules established by AEDPA. On September 30, 1996, Congress enacted IIRIRA. Under IIRIRA there are

two new sets of rules: the new permanent rules and the "transitional rules." *See* IIRIRA § 309(c), as amended by Act of Oct. 11, 1997, § 2, Pub.L. No. 104-302, 110 Stat. 3656, 3657. As made clear by the technical amendments, the new permanent rules under IIRIRA are effective for cases in which the INS instituted removal proceedings on or after April 1, 1997. *See id.* In contrast, the transitional rules are to be applied to deportation proceedings which were commenced before April 1, 1997. Because Goncalves' deportation was initiated before April 1, 1997, his claims are governed by the transitional rules, as both the Attorney General and Goncalves agree.

Goncalves' petition, governed by the transitional rules,[3] raises pure issues of law. The first is whether, under the transitional rules, Congress intended for jurisdiction over this case to be vested, if indeed in any

---

[3] The new permanent rules nevertheless have some relevance. Under the permanent rules, Congress allowed a new form of discretionary relief from deportation for those aliens convicted of crimes, but limited this new relief to a smaller category of aliens than had historically been eligible (pre-AEDPA) to seek § 212(c) relief. IIRIRA § 304, adding new INA § 240A, codified at 8 U.S.C.A. § 1229b (West Supp.1998), consolidates "suspension of deportation" relief and aspects of the former § 212(c) relief into a new form of relief called "cancellation of removal." "Cancellation of removal" relief restores discretionary relief for aliens who are deportable because they have committed two or more crimes involving moral turpitude under INA § 237(a)(2)(A)(ii). Thus, if Goncalves had been charged with deportability on this ground after April 1, 1997, he would have been permitted to apply for this new form of relief. "Cancellation of removal" relief, like § 212(c) relief before AEDPA, is available for all aliens whose criminal convictions do not qualify as "aggravated felonies." *See* IIRIRA § 304(a) (adding new INA § 240A).

court, in the court of appeals, as the Attorney General argues, or in the district court on petition for habeas corpus, as Goncalves argues. We pause to note that the position taken by the Attorney General now is the opposite of the position she took in *Kolster*.[4] If the Attorney General is correct, then, she argues, Goncalves loses his case because he did not file a petition with this court within the thirty day period of time allotted.[5]

If Goncalves is correct, there is no time limitations problem, but there is a different problem. We must look at whether Goncalves may raise on habeas the type of statutory claim he now makes: that as a pure issue of law, the Attorney General is mistaken in her conclusion that Congress intended its restrictions of § 212(c) relief to apply retroactively. If there was jurisdiction over such a claim, then we must review de

---

[4] The Attorney General has reversed her position on which court has jurisdiction because of her interpretation of the judicial review provisions of IIRIRA, which we discuss below.

[5] Of course, this court's *Kolster* and *Santos* decisions, and petitioner's apparent reliance on those decisions, complicate any use of the thirty day limit to dismiss Goncalves' case. Even if we to were reverse *Kolster* and hold that Goncalves could have presented his claims on direct review in this court, a substantial question would remain as to whether we would apply the thirty day limit for filing to Goncalves. A long line of Supreme Court cases, beginning with *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed.2d 296 (1971), has refused to apply newly-specified statutes of limitations retroactively to bar suits that, under controlling precedent, were filed in a timely manner. *See also American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 110 S. Ct. 2323, 110 L.Ed.2d 148 (1990); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 107 S. Ct. 2022, 95 L.Ed.2d 582 (1987). Thus, it is likely we would have to reach the merits of this case in any event.

novo the district court's determination that the Attorney General's decision is correct.

III. Jurisdiction

A. Jurisdiction in the Court of Appeals

The Attorney General argues that Goncalves should have presented any claims that he could have made in a petition for review to this court within thirty days of the INS's final decision, and that he is therefore precluded from making such claims on habeas. The short answer is that this argument is foreclosed by *Kolster*, and that any argument that IIRIRA requires us to reconsider *Kolster* is foreclosed by *Santos*. However, as this court did not fully explain its reasoning in *Santos*, and the Attorney General continues to press this argument, we explain why Goncalves could not have filed a petition for review in this court.

We start with the language of the transitional rules provisions of the statute, for the general rule is that "'[c]ourts created by statute can have no jurisdiction but such as the statute confers.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818, 108 S. Ct. 2166, 2179, 100 L.Ed.2d 811 (1988) (quoting *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449, 12 L.Ed. 1147 (1850)). IIRIRA § 309(c)(1), as amended by Act of Oct. 11, 1997, § 2, Pub. L. No. 104-302, 110 Stat. 3656, 3657, provides:

> Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings [before April 1, 1997]—

> (A) the amendments made by this subtitle shall not apply, and
>
> (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

This provision of IIRIRA seemingly supports the Attorney General because it makes judicial review of final orders of deportation for aliens under the transitional rules subject to old INA § 106 (as then in effect), which IIRIRA § 306(b) repeals. Old INA § 106 made the judicial review provisions of the APA, codified at 28 U.S.C. ch. 158 (1994), applicable (with modifications) to immigration decisions. The APA judicial review provisions vest the courts of appeals with jurisdiction to review final agency action. *See* 28 U.S.C. § 2344 (1994).

The IIRIRA provision establishing "transitional rules," IIRIRA § 309(c)(1), is, however, expressly subject to IIRIRA § 309(c)(4)(G), which provides:

> (4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW.—In the cases described in paragraph (1) in which a final order of exclusion or deportation is entered more than 30 days after the date of enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of date of enactment of this Act) to the contrary—
>
> * * *
>
> (G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered . . . by section

> 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2) (A)(i) of such Act (as so in effect).

Goncalves falls within the language of subpart (G), as the parties recognize.[6]

A straightforward reading of subpart (G) leads to the conclusion that IIRIRA does not permit initial jurisdiction in the courts of appeals to hear "appeals" by aliens, like Goncalves, who have been convicted of two crimes of moral turpitude. The section says "there shall be no appeal," a reference to an appeal to the courts of appeals. From this, it is clear that there is no grant of jurisdiction to the courts of appeals over this category of transitional cases, i.e., claims by aliens deportable by reason of having committed specified criminal offenses.

Despite the literal language of IIRIRA § 309(c)(4)(G), the Attorney General argues that subpart (G) should be read differently, in light of the separate judicial review provisions for aliens governed by the permanent rules found at IIRIRA § 306. The Attorney General relies on IIRIRA § 306(a), which adds new INA § 242(g), 8 U.S.C.A. § 1252(g) (West Supp.1998):

---

[6] There is no doubt that Goncalves' concession that he had been convicted of two or more "crimes involving moral turpitude, not arising out of a single scheme of criminal conduct," rendered him deportable pursuant to old INA § 241(a)(2)(A)(ii). Before the IJ, Goncalves conceded at least two convictions for which he was punished by a term of imprisonment longer than one year, so "both predicate offenses are . . . otherwise covered by section 241(a)(2)(A)(i) of [the old INA.]"

> "(g) EXCLUSIVE JURISDICTION.—Except as provided in this section [i.e., new INA § 242] and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act."

Although IIRIRA § 306 is generally concerned with the permanent rules and has an effective date of April 1, 1997 and so does not affect Goncalves, there is a special effective date for that part of IIRIRA § 306 comprising new INA § 242(g).[7] Thus, new INA § 242(g) applies to Goncalves' claims. The Attorney General argues that this provision was meant to consolidate all review in the courts of appeals, so that Goncalves can make his claims, if at all, only in the courts of appeals.

But new INA § 242(g) does not read as the Attorney General suggests. The subsection does not refer to consolidation of all cases in the courts of appeals or state that the courts of appeals would have "exclusive jurisdiction." The "exclusive jurisdiction" title refers to the grants of jurisdiction provided in new INA § 242 as does the "except as provided in this section" language. The language is not meant to consolidate all review in the courts of appeals; indeed, new INA § 242 has explicit provisions referring to jurisdiction in courts other than the courts of appeals. There are provisions gov-

---

[7] That special rule, contained in IIRIRA § 306(c), as amended by Act of Oct. 11, 1997, § 2, Pub. L. No. 104-302, 110 Stat. 3656, 3657, provides that new INA § 242(g) shall apply "without limitation to claims arising from all past, pending or future exclusion, deportation or removal proceedings under this Act."

erning habeas corpus proceedings, and, in a defined category of cases, providing for exclusive jurisdiction in the District Court of the District of Columbia.

Indeed, new INA § 242 contradicts the Attorney General's argument. Of particular significance is new INA § 242(e)(2), which states that the habeas corpus review of orders denying aliens entry to the United States is restricted to certain narrow questions. This section assumes that such jurisdiction exists, presumably pursuant to 28 U.S.C. § 2241. As the courts of appeals ordinarily may not issue original writs of habeas corpus but instead will refer such petitions to the appropriate district court, *see* Fed. R. App. P. 22(a), and as the Supreme Court will only consider a petition for an original writ of habeas corpus in very limited circumstances, *see* Sup. Ct. R. 20(4)(a), the statute apparently assumes that such review will initially be in the district courts. Thus, the language of new INA § 242(g) assumes the existence of some habeas jurisdiction in the district court.

We do not, in conclusion, read the new INA § 242 as granting jurisdiction to the courts of appeals in transitional rules cases over this category of claims. The more difficult question, we believe, is whether these provisions were meant to preclude *any* exercise of jurisdiction, even on habeas, over claims, constitutional or otherwise, by aliens in the position of Goncalves.

B. Habeas Jurisdiction in the District Courts

1. Positions of Parties

We wish to be clear about the Attorney General's position. She argues not that all review is precluded but rather that some limited scope of review is available to hear certain sorts of claims, and that Goncalves' claims do not fall within the permissible scope of review. The Attorney General argues that there must be an Article III court available to hear substantial claims of violation of constitutional rights amounting to a fundamental miscarriage of justice.[8] But Goncalves himself presents no such claim, she asserts. In addition, the Attorney General argues, there must be inherent authority in the judiciary to review certain non-constitutional claims, i.e., whether the person being deported meets the statutory prerequisites: that the person is an alien, has been convicted of the crimes, and the convictions are of the sort which meet the statutory definitions. But Goncalves, she notes, does not present

---

[8] We express no opinion on the Attorney General's constitutional arguments. We note, however, that the Attorney General's formulation of the standard of constitutionally-compelled review is drawn from the very different context of successive federal habeas corpus petitions by prisoners in state custody who have already had one or more opportunities for full judicial process and appeals in the state system, with an opportunity for further review in the Supreme Court by a writ of certiorari, and one or more opportunities for review in the federal judiciary on their first habeas petition. *See Herrera v. Collins*, 506 U.S. 390, 404, 113 S. Ct. 853, 862-63, 122 L.Ed.2d 203 (1993). Goncalves, in contrast, is in federal custody and has only been afforded the first level of *administrative* review of his case. Indeed, the Attorney General's position is that there should be no judicial review in any court of Goncalves' claims.

these types of claims either. The Attorney General essentially argues there is an inherent jurisdiction to hear these constitutional and statutory prerequisite categories of claims, although IIRIRA itself makes no provisions for either type of review as to aliens like Goncalves.

It is far from clear from what source the Attorney General finds the authority for such review. One theory is that the authority may be derived not from an explicit statutory text but, at best, from the interstices of the various immigration statutes. Another theory is that the source of jurisdiction is the Constitution itself. Both theories present obvious problems.

Goncalves asserts that the question he poses—a question of statutory construction—is subject to judicial review. In contrast to the Attorney General, Goncalves grounds judicial review directly on statutory authority: the grant of habeas corpus jurisdiction under 28 U.S.C. § 2241. This grant has been part of the juridical fabric of this nation since its enactment in the first Judiciary Act. *See* Judiciary Act of 1789, § 14, 1 Stat. 73, 81-82; *see generally* Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* ch. 11, § 1 (4th ed.1996); Erwin Chemerinsky, *Federal Jurisdiction* § 15.1, at 780 (2d ed. 1994) (noting Blackstone's reference to the writ of habeas corpus as "the most celebrated writ in English law"). It is only if we conclude that Congress intended in IIRIRA to eliminate that grant of habeas jurisdiction that we must face the question of whether some form of review on habeas

is mandated by the Suspension Clause,[9] or, as Goncalves argues, by the Due Process Clause of the Fifth Amendment or by Article III itself, and, if so, the nature of that review.

2. Congressional Intent to Repeal 28 U.S.C. § 2241

The Attorney General argues that Congress has repealed 28 U.S.C. § 2241, as applied to immigration cases such as this one. Under *Felker*, *supra*, the question we must decide is whether Congress has expressly repealed or modified the federal courts' habeas authority, here under § 2241. *Felker* makes clear that if Congress intends to repeal or restrict habeas jurisdiction under § 2241, it must say so explicitly. Thus, we will not find a repeal of § 2241 merely by implication, but only by express congressional command.

In *Felker*, the issue was whether Title I of AEDPA, which through §§ 106(b)(1) and (b)(2) amended 28 U.S.C. § 2244(b), also was meant to eliminate the Supreme Court's original habeas jurisdiction under 28 U.S.C. §§ 2241 and 2254. In concluding that AEDPA tit. I preserved the Supreme Court's jurisdiction to issue original habeas petitions, the *Felker* court applied the model of decision the Supreme Court had used more than a century earlier in *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 19 L.Ed. 332 (1869).

---

[9] The Suspension Clause provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2.

Ex parte Yerger refused to read an act of Congress as impliedly impairing habeas corpus jurisdiction in light of its constitutionally protected status. Previously, in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 19 L.Ed. 264 (1869), the Supreme Court had upheld an act of Congress that expressly restricted appeals of habeas cases under the Judiciary Act of 1867, 15 Stat. 385, for prisoners in state custody. In *Ex parte Yerger*, the Court avoided impairing the historical core of habeas jurisdiction, and addressing the attendant Suspension Clause issues, by interpreting the repeal at issue in *Ex parte McCardle* as affecting only appeals under the 1867 Act, and not appeals under the Judiciary Act of 1789, which provided the grant of habeas jurisdiction for prisoners in federal custody. As Goncalves is in federal custody and seeks review of an administrative proceeding, not collateral review of a judicial proceeding, his case is directly governed by *Ex parte Yerger*.

Felker regarded *Ex parte Yerger* as adopting a general rule of construction that any repeal of the federal courts' historic habeas jurisdiction, whether for prisoners in federal or state custody, must be explicit and make express reference specifically to the statute granting jurisdiction. Application of the *Ex parte Yerger* rule to Goncalves' case is thus even more appropriate than in *Felker* itself, as Goncalves is in federal custody and has had no judicial review of his claims whatsoever.

There is no question that, unless it has been expressly repealed, § 2241 provides a basis for reviewing immigration decisions. Aliens in custody of federal immigration officials have traditionally been able to

obtain review of immigration decisions by petitioning for a writ of habeas corpus under what is now § 2241. Soon after the federal government began to regulate immigration, the Supreme Court considered an argument that the habeas corpus statute did not apply to an alien under a theory that the only restraint on his liberty was that "he was not permitted to enter the United States." *United States v. Jung Ah Lung*, 124 U.S. 621, 626, 8 S. Ct. 663, 666, 31 L.Ed. 591 (1888). The Supreme Court rejected this argument as applied to aliens in custody of federal officials. *See id.* Habeas corpus review remained the principal avenue for judicial oversight of immigration laws until the Supreme Court's decision to allow more expansive review of immigration decisions under the APA, later codified in old INA § 106. *See Shaughnessy v. Pedreiro*, 349 U.S. 48, 75 S.Ct. 591, 99 L.Ed. 868 (1955).

Although the Attorney General suggests that the application of the APA to immigration decisions *repealed* habeas review under § 2241, we find no authority that supports this proposition. The decisions that she says stand for the proposition that APA review in the courts of appeals precluded any jurisdiction in the district courts concern jurisdiction under the APA, not habeas jurisdiction under § 2241. *See, e.g., Agosto v. INS*, 436 U.S. 748, 752-53, 98 S. Ct. 2081, 2084-85, 56 L.Ed.2d 677 (1978) (old INA § 106 "eliminated district court review of deportation orders *under § 10 of the Administrative Procedure Act*, and replaced it with direct review in the courts of appeals . . . ." (emphasis added)). Indeed, the Supreme Court expressly stated that the vesting of jurisdiction to review orders under the APA exclusively in the courts of appeals "of course . . . in no way impairs the

. . . availability of habeas corpus relief." *Foti v. INS*, 375 U.S. 217, 231, 84 S. Ct. 306, 315, 11 L.Ed.2d 281 (1963). The Attorney General's argument that Congress' decision to make available another avenue for judicial review repeals by implication the previous jurisdiction exercised pursuant to § 2241 is precisely what *Felker* and *Ex parte Yerger* do not permit.

The Attorney General contends, in addition, that AEDPA and IIRIRA have expressly repealed jurisdiction under § 2241. We find no such express language. First, the language in IIRIRA that restricts jurisdiction over this category of aliens states:

> [N]otwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of enactment of this Act) to the contrary—
>
> * * *
>
> (G) there shall be no appeal permitted in the case of an alien who is . . . deportable by reason of having committed [particular] criminal offense[s]. . . .

IIRIRA § 309(c)(4). In *Felker*, the language at issue in AEDPA provided that "the grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition . . . for a writ of certiorari." For present purposes we see no significant distinction between the language faced by the *Felker* Court that an order "shall not be appealable" and the language we face that "there shall be no appeal per-

mitted." Both provisions restrict one avenue of relief—in *Felker*, by restricting the Supreme Court's jurisdiction to hear appeals and to entertain writs of certiorari, and in this case, by restricting an "appeal" under the APA judicial review provisions. *Felker* holds that such language is not explicit enough impliedly to impair habeas corpus jurisdiction.

The Attorney General relies also on AEDPA § 401(e), explicitly repealing old INA § 106(a)(10), which had referred to habeas jurisdiction.[10] Section 106(a)(10) had provided:

> (10) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

Thus, the Attorney General argues, AEDPA eliminates not only the prior authorization for the exercise of habeas jurisdiction (in addition to APA review) in old INA § 106(a)(10), but also the basic grant of habeas jurisdiction contained in 28 U.S.C. § 2241.

However, Congress was explicit that it was striking the reference to habeas in old INA § 106(a)(10). It did not, in contrast, expressly amend or alter 28 U.S.C.

---

[10] AEDPA § 401(e) provides

> (e) ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS.—Section 106(a) of the Immigration and Nationality Act (8 U.S.C. § 1105a(a)) is amended—
>
> * * * * * *
>
> (3) by striking paragraph (10).

§ 2241. Old INA § 106(a)(10) was a specialized immigration provision which had made clear that aliens with access to the ordinary judicial review processes also could seek habeas review if they were in custody. This provision ensured that such aliens would have a supplemental collateral remedy,[11] and did not apply to aliens who could not obtain review under the APA judicial review provisions. Aliens without other recourse had traditionally been able to obtain review by habeas corpus, even in the face of statutory language precluding all other review. *See Heikkila v. Barber*, 345 U.S. 229, 233-35, 73 S. Ct. 603, 605-06, 97 L.Ed. 972 (1953). In enacting AEDPA, Congress was concerned about abuses of duplicative judicial remedies, and the elimination of old INA § 106(a)(10) served that congressional purpose.[12] It does not follow from the repeal of this provision of the INA that § 2241 habeas jurisdiction has been repealed altogether in immigration cases. Had Congress wished to eliminate any possible habeas jurisdiction under 28 U.S.C. § 2241, it could easily have inserted an explicit reference, but it did not.

This conclusion is reinforced by the fact that both IIRIRA and AEDPA make specific reference when they amend or repeal statutes granting jurisdiction to the federal courts. *See Felker*, 518 U.S. at 659-63, 116 S. Ct. at 2338-39. For example, AEDPA § 440(a), the

---

[11] The provision may also have ensured that APA review would be available, despite an argument that the existence of the habeas remedy was an alternative "adequate" remedy that would normally preclude such review. *See Town of Sanford v. United States*, 140 F.3d 20, 22-23 (1st Cir. 1998).

[12] *See* 141 Cong. Rec. S7823 (daily ed. June 7, 1995) (statement of Senator Abraham) (decrying the capacity of aliens to seek "repeated" or "successive" judicial review).

provision at issue in *Kolster*, made specific reference to old INA § 106, the judicial review provision, providing that "Section 106 of the Immigration and Nationality Act (8 U.S.C. § 1105a(a)(10)) is amended. . . ." Likewise, AEDPA § 401(e), eliminating supplemental habeas jurisdiction under the INA, refers specifically to "Section 106(a) of the Immigration and Nationality Act," not 28 U.S.C. § 2241.[13]

Similarly, IIRIRA contains numerous provisions restricting or altering various avenues for judicial review, but in none of these provisions does IIRIRA mention § 2241. For example, IIRIRA § 306, enacting new INA § 242, refers specifically to several different grants of jurisdiction. That new section contains provisions referring specifically to the judicial review provisions of the APA, codified at 28 U.S.C. ch. 158, *see* new INA § 242(a)(1), and to the Declaratory Judgment Act, codified at 28 U.S.C. § 2201, *see* new INA § 242(b)(5)(B), (7)(B). The new INA § 242 purports to restrict the jurisdiction of the federal courts in such proceedings. Indeed, far from repealing § 2241 habeas jurisdiction, new INA § 242 presumes the existence of on-going habeas jurisdiction. This severely undermines the Attorney General's argument for implied repeal of § 2241 in immigration cases. IIRIRA was enacted after *Felker*, and Congress was well aware of the need for specific language if it wished to impair the Great Writ.

Nonetheless, the Attorney General argues that new INA § 242(g), the exclusivity provision, can be read to

---

[13] In AEDPA, when Congress wanted to amend habeas relief for state and federal prisoners seeking post-conviction review, it did so explicitly. *See* AEDPA tit. I.

imply a repeal of § 2241 even without a specific reference. She argues that new INA § 242(g) provides that "notwithstanding any other provision of law, no court shall have jurisdiction" "except as provided in this section," i.e. new INA § 242, and so there is no need specifically to repeal § 2241. The new INA § 242, argues the Attorney General, is the only source of jurisdiction in immigration cases. Thus, it would require a specific reference to § 2241 to preserve such jurisdiction, rather than a specific reference to abolish it. *But see Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11, 62 S. Ct. 875, 880-81, 86 L.Ed. 1229 (1942) (noting that, absent a specific repeal of jurisdictional authority, "[t]he search for significance in the silence of Congress is too often the pursuit of a mirage").

This argument leads us to apply the long standing rule disfavoring repeal of jurisdictional provisions by implication, a rule which is particularly appropriate here. *See Felker*, 518 U.S. at 659-63, 116 S. Ct. at 2338-39. Although the breadth of the "notwithstanding" clause is sweeping, a reading which provided for no exceptions would have enormous consequences that are contrary to clearly expressed congressional intent. If the "notwithstanding" clause of subsection (g) is read to preclude *any* jurisdiction except that specifically authorized in new INA § 242, then that conflicts with IIRIRA § 309. Judicial review would be blocked not only for the narrow class of aliens in Goncalves' position, but for every alien subject to IIRIRA's "transitional rules." As new INA § 242 is only applicable for aliens subject to IIRIRA's "permanent rules," *see* IIRIRA § 309, and as new INA § 242(g) is applicable immediately, *see* IIRIRA § 306(c), aliens subject to the transitional rules—i.e., every alien now in the admin-

istrative process whose case began prior to April 1, 1997—could not obtain any judicial review because they cannot take advantage of "this section," i.e., new INA § 242. Such a reading would clearly conflict with the congressional intent expressed in IIRIRA § 309 to preserve review in the transitional period under old INA § 106.

Finally, our refusal to find express repeal of § 2241 in new INA § 242(g) eliminates the need to address serious, novel and complex constitutional issues. We would be loath to find a repeal where that repeal creates serious constitutional problems. We note these constitutional concerns briefly to underscore the wisdom of avoiding them.

First, a finding that there is no statutory provision for any judicial review of the type of claim raised by Goncalves would raise substantial and complex constitutional questions concerning the limits of Congress' power under Article III to control the jurisdiction of the federal courts.[14] The Supreme Court has often interpreted statutes to avoid serious constitutional questions presented where statutory provisions appeared to foreclose review of constitutional claims by an Article III court. *See, e.g., Webster v. Doe*, 486 U.S. 592, 108 S. Ct. 2047, 100 L.Ed.2d 632 (1988) (interpreting a statute, to avoid constitutional questions, to preserve review of a former CIA employee's claim who challenged a decision to fire him because of his homosexuality); *United States v. Mendoza-Lopez*, 481 U.S. 828, 838-39, 107 S. Ct. 2148, 2155-56, 95 L.Ed.2d 772

[14] Again, we distinguish such claims by aliens from post-conviction habeas proceedings by state and federal prisoners.

(1987) (requiring judicial review of the legality of a deportation order if that order is used "to conclusively establish an element of a criminal offense").

Second, a decision that Congress has repealed § 2241 would require us to decide whether the Suspension Clause of the Constitution permits Congress to do this. Goncalves seeks review under this grant of jurisdiction in a posture which the Supreme Court has recognized is the historical core of the Suspension Clause—jurisdiction to review the legality of detention by executive branch officers. *See Felker*, 518 U.S. at 661-65, 116 S. Ct. at 2339-40 (noting that the writ originally only extended to prisoners in federal custody who were not "detained in prison by virtue of the judgment of a court" (citation and internal quotation marks omitted)); *see also Swain v. Pressley*, 430 U.S. 372, 386, 97 S. Ct. 1224, 1232, 51 L.Ed.2d 411 (1977) (Burger, C.J., concurring) ("[T]he traditional Great Writ was largely a remedy against executive detention.").

Our interpretation also avoids the question of whether the Constitution's Suspension Clause alone, unaided by statute, provides jurisdiction and the equally vexing issue of what kinds of claims are permitted under such novel jurisdiction. That, in turn, would raise the further question of the constitutional minimum content of judicial review for deportation decisions.[15]

---

[15] The Attorney General cites to broad statements concerning Congress' power to entrust administrative officials with primarily adjudicating deportation and exclusion cases. *See, e.g., Carlson v. Landon*, 342 U.S. 524, 537, 72 S. Ct. 525, 532-33, 96 L.Ed. 547

For all of these reasons, we find no express congressional intent in the language of either AEDPA or IIRIRA that prevents an alien who is precluded from seeking judicial review under the APA by IIRIRA § 309(c)(4)(G) from seeking a writ of habeas corpus under 28 U.S.C. § 2241 to assert claims of the nature being asserted here. "This is the reasonable construction of the acts of Congress here in question, and they need not be otherwise interpreted. . . . The words here used do not require an interpretation that would invest executive or administrative officers with . . . absolute, arbitrary power." *Japanese Immigrant Case*, 189 U.S. at 101, 23 S. Ct. at 615. Nor do they require a construction that would force this court to resolve the fundamental constitutional questions a repeal of § 2241 would provoke.

(1952). But those cases took the availability of habeas review for granted. The question being asked was not whether Congress could withdraw habeas, but whether the Due Process Clause required more than the limited review available on habeas. *See Heikkila*, 345 U.S. at 233, 73 S. Ct. at 605 (Congress may constitutionally entrust fact-finding to administrative officials *because* review of the legality of the immigration authorities' actions is available on habeas). In *Heikkila*, for example, the Supreme Court stated that prior Immigration Acts were intended to foreclose judicial review to the fullest extent consistent with the Constitution. *See Heikkila*, 345 U.S. at 234-35, 73 S. Ct. at 605-06. However, under those Acts the availability of review on habeas corpus under § 2241 was never in doubt and the *Heikkila* court regarded that review as the constitutional floor. *See id.*; *see also Landon v. Plasencia*, 459 U.S. 21, 32-34, 103 S. Ct. 321, 329-30, 74 L.Ed.2d 21 (1982) (affirming procedural due process rights of permanent residents in exclusion proceedings); *Japanese Immigrant Case (Yamataya v. Fisher)*, 189 U.S. 86, 100-02, 23 S. Ct. 611, 614-15, 47 L.Ed. 721 (1903) (recognizing rights of aliens to due process in administrative decisionmaking, enforceable on habeas corpus).

3. Does the Scope of Review Include Goncalves' Claims?

Jurisdiction being proper under 28 U.S.C. § 2241, we address the further question of whether Congress intended to restrict the scope of review on habeas to preclude review of the questions Goncalves poses.

In determining the scope of habeas review, we again start with the language of the statute, § 2241:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had . . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States . . . or
>
> . . .
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

Both subsections (c)(1) and (c)(3) are applicable here. The language of § 2241 itself does not contemplate a limitation of jurisdiction only to constitutional claims; instead, it contemplates challenges based on the "Constitution *or laws* or treaties of the United States."

Indeed, numerous immigration cases under the § 2241 jurisdiction have considered claims of statutory right, sometimes described as an integral part of ensur-

ing due process *of law*. *See, e.g., Brownell v. Tom We Shung*, 352 U.S. 180, 182-84 n. 1, 77 S. Ct. 252, 254-55 n. 1, 1 L.Ed.2d 225 (1956) ("due process," enforceable on habeas, includes "conformity to statutory grounds"); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 73 S. Ct. 472, 97 L.Ed. 576 (1953) (rejecting, on habeas, executive branch interpretation of procedural regulation); *Wong Yang Sung v. McGrath*, 339 U.S. 908, 70 S. Ct. 564, 94 L.Ed. 1336 (1950) (rejecting, on habeas, executive branch's interpretation of APA procedural requirements); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 68 S. Ct. 374, 92 L.Ed. 433 (1948) (rejecting, on habeas, executive branch's interpretation of multiple criminal conviction deportation provision); *Delgadillo v. Carmichael*, 332 U.S. 388, 68 S. Ct. 10, 92 L.Ed. 17 (1947) (rejecting, on habeas, executive branch's interpretation of statutory term "entry"); *Kessler v. Strecker*, 307 U.S. 22, 59 S. Ct. 694, 83 L.Ed. 1082 (1939) (rejecting, on habeas, executive branch's interpretation of provision making aliens deportable on ideological grounds); *Mahler v. Eby*, 264 U.S. 32, 44 S. Ct. 283, 68 L.Ed. 549 (1924) (rejecting, on habeas, executive branch's interpretation of findings necessary for deportation after conviction under espionage act); *Gegiow v. Uhl*, 239 U.S. 3, 36 S. Ct. 2, 60 L.Ed. 114 (1915) (rejecting, on habeas, executive branch's interpretation of "public charge" ground of exclusion). As Justice Holmes observed in *Gegiow*, the enforcement of statutory claims is essential to ensuring that the intent of Congress is observed when it chooses to define the grounds for which aliens may be excluded or deported:

> The statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the

> record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon *habeas corpus*.

Gegiow, 239 U.S. at 9, 36 S. Ct. at 2-3 (emphasis in original).

The government relies on dictum in *Yang v. INS*, 109 F.3d 1185 (7th Cir.1997), stating that "an error of law does not support a writ of habeas corpus. . . ." *Id.* at 1196. That decision, however, was describing what the Seventh Circuit considered to be the minimum content of the constitutional writ; recently, the Seventh Circuit has moderated its statement in *Yang* that new INA § 242(g) had repealed 28 U.S.C. § 2241 in all cases. *See Turkhan v. INS*, 123 F.3d 487, 489-90 (7th Cir. 1997).

In other respects, *Yang* and some similar statements in district court opinions, *see, e.g., Mbiya v. INS*, 930 F. Supp. 609, 612 (N.D.Ga.1996) (requiring a "fundamental miscarriage of justice" before a challenge can be made on habeas corpus), have their origin in the very different standard that is applied to review of federal and state court convictions under 28 U.S.C. §§ 2254, 2255. *See United States v. Timmreck*, 441 U.S. 780, 784, 99 S. Ct. 2085, 2087-88, 60 L.Ed.2d 634 (1979) (requiring "complete miscarriage of justice" to set free a convicted prisoner who alleges violation of a nonjurisdictional federal statute or rule).

In neither AEDPA nor IIRIRA did Congress purport to apply state prisoner post-conviction relief rules to the entirely different provisions about deportation of aliens. We are disinclined automatically to import this standard into cases at the core of the traditional writ of habeas corpus—initial review of the legality of executive branch detention. This is especially so in light of the long line of precedent allowing aliens to make statutory claims on habeas. In cases concerning collateral review of state and federal convictions, a prisoner has already had substantial judicial review of his claims, including a trial and direct review of his conviction, often with multiple levels of review, and is seeking post-conviction relief. In Goncalves' case, by contrast, no court, state or federal, has heard his claims. In fact, it is the Attorney General's position that no court will ever have jurisdiction or authority to review her decision interpreting AEDPA § 440(d). The pure statutory claims Goncalves makes here are well within precedent interpreting the core habeas protection provided by § 2241.[16]

We address one final argument in favor of the Attorney General. The Attorney General contends that, because she has discretion to grant or deny this relief from deportation in any event, her decision concerning Goncalves' statutory eligibility for this form of relief is itself not reviewable on habeas. We dis-

---

[16] Indeed, the existence of this jurisdiction over statutory claims provides a ready basis for the federal courts to examine one category of questions that the Attorney General says must be allowed: prerequisite questions such as whether the petitioner is in fact an alien, whether he or she has been convicted of crimes that render him deportable within the meaning of the statute, and the like.

agree. Analytically, the decision whether an alien is eligible to be considered for a particular discretionary form of relief is a statutory question separate from the discretionary component of the administrative decision whether to grant relief. *See, e.g., Ipina v. INS*, 868 F.2d 511, 513 (1st Cir. 1989) (contrasting legal question of whether an alien is a "refugee," and thus eligible for asylum, with discretionary decision whether to grant asylum).

Supreme Court precedent also requires us to reject this argument. The Court has determined that the refusal of the BIA to consider an alien's request for discretionary relief, in violation of statute or regulations, is a valid claim on habeas corpus. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, 98 L.Ed. 681 (1954). In making certain aliens eligible for discretionary relief, Congress intended the Attorney General or her designated subordinates to make a judgment. A refusal to make that judgment would frustrate Congress' intent. "[I]f the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience." *Id.* at 266-67, 74 S. Ct. at 503. Thus it is no answer to Goncalves' argument to emphasize the broad discretion of the political branches in immigration matters. It was the intent of Congress that such discretion be exercised.

Our holding is narrow and nothing we say should be taken to suggest that such review as is available on habeas is necessarily as broad as the traditional administrative review available under old INA § 106. For example, we are not being asked to "review[ ] and

revers[e] the manner in which discretion was exercised" by examining "the evidence in the record supporting or undermining the alien's claim to discretionary relief." *Id.* at 268, 74 S. Ct. at 503. Whether such review is now available on habeas presents a different question than Goncalves' claim. The Supreme Court noted, in rejecting early attempts to apply the APA to immigration decisions, the very different scope of review required by "deciding on 'the whole record' whether there is substantial evidence to support administrative findings of fact," required by the APA, and the more basic review available on habeas that provides for "enforcement of due process requirements." *Heikkila*, 345 U.S. at 235-36, 73 S. Ct. at 606. That more basic review includes claims of statutory right, but not the broad review of administrative decisionmaking available under the APA. New INA § 242(a)(2)(B) denies jurisdiction to review discretionary decisions, at least for most cases under the permanent rules. We leave to future cases the task of defining the precise limit of the jurisdiction under 28 U.S.C. § 2241 in immigration cases.[17] We hold only that § 2241 allows us to consider the pure statutory question that Goncalves raises in this case.

---

[17] Amici law professors argue that habeas jurisdiction also traditionally allowed review, under a "manifest abuse of discretion" standard, of the *exercise* of discretion to deny relief. We do not address the question, which we view as separate and not presented by this case, of whether IIRIRA was intended to foreclose or impose limits on any such review. We hold today only that, on habeas, a petitioner may challenge the immigration authorities' failure to exercise discretion granted by statute.

4. Decisions of Other Circuits

Our approach to the jurisdiction-limiting provisions of both AEDPA and IIRIRA is in conformity with that of our sister circuits. Each circuit court has now held that AEDPA § 440(a), the initial limitation of jurisdiction which IIRIRA § 309(c)(4)(G) carries forward, deprives the courts of appeals of jurisdiction to entertain petitions for review of aliens convicted of specified criminal offenses. In every circuit which has addressed constitutional challenges to this withdrawal of jurisdiction, the court found that preclusion of all judicial review would present serious constitutional questions, and in every case those questions were avoided by noting the continuing availability of habeas review. Although the cases diverge in their approaches, they all agree on these two basic points—that Congress can constitutionally withdraw jurisdiction over such petitions for review under old INA § 106, but that some jurisdiction remains on habeas.[18] *See Turkhan*, 123 F.3d at 489-90; *Mansour v. INS*, 123 F.3d 423, 426 (6th Cir. 1997); *Auguste v. Attorney General*, 118 F.3d 723, 726 n. 7 (11th Cir. 1997); *Ramallo v. Reno*, 114 F.3d 1210, 1214 & n. 1 (D.C. Cir. 1997); *Williams v. INS*, 114 F.3d 82, 83-84 (5th Cir. 1997); *Fernandez v. INS*, 113 F.3d 1151, 1154-55 (10th Cir. 1997); *Salazar-Haro v. INS*, 95 F.3d 309, 311 (3d Cir. 1996); *Hincapie-Nieto v.*

---

[18] *Hose v. INS*, 141 F.3d 932 (9th Cir. 1998) also concludes that some form of review is constitutionally compelled. *Hose* interpreted a different provision of IIRIRA and a different claim and found that, in light of the availability of review in the court of appeals over the petitioner's claim, no habeas relief was available. *See id.*

INS, 92 F.3d 27, 30-31 (2d Cir. 1996); *Duldulao v. INS*, 90 F.3d 396, 400 n. 4 (9th Cir. 1996).[19] Indeed, many of the courts which have considered constitutional challenges cited *Felker* in support of the view that some jurisdiction remains on habeas, and some noted its holding disfavoring repeal of 28 U.S.C. § 2241 by implication.

Thus, although no circuit court has yet directly faced the issue of whether a court has jurisdiction on habeas to consider a claim like Goncalves', the great weight of circuit authority is in favor of some form of habeas review for aliens in Goncalves' position. We conclude that Goncalves properly brought his claim in the district court under its § 2241 habeas jurisdiction.

IV. Retroactivity of AEDPA § 440(d)

We turn to the statutory merits question: whether Congress intended for AEDPA § 440(d)'s restrictions on § 212(c) relief to apply retroactively to persons in Goncalves' position. The Attorney General's *Soriano* opinion concludes that the restrictions are fully retroactive and are applicable even to pending applications. We reject the Attorney General's reading of *Landgraf*, *supra*, a reading that the Supreme Court has also recently rejected. *See Hughes Aircraft*, 520 U.S. at ——-——, 117 S. Ct. at 1876-78. We conclude that Congress

---

[19] The Eighth Circuit and the Fourth Circuit have each applied the jurisdiction-limiting provisions of AEDPA § 440(a) in short per curiam decisions, without considering whether habeas review remains available. *See Mendez-Morales v. INS*, 119 F.3d 738 (8th Cir. 1997) (per curiam); *Dehaney v. INS*, No. 96-1449, 1997 WL 135664 (4th Cir. 1997) (unpublished per curiam).

did not intend AEDPA § 440(d) to apply retroactively to Goncalves' application.

A. Deference

Initially, we must consider what deference is owed to the Attorney General's *Soriano* decision holding that AEDPA § 440(d) is retroactive and applies to pending applications for § 212(c) relief. The Attorney General argues that the plain text of AEDPA § 440(d) does not answer the question of whether it is retroactive or applies to pending cases and that her interpretation regarding its effective date is, at least, a reasonable one under *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984).[20] As the Attorney General notes, under the

---

[20] Of course, the Attorney General's argument assumes that it is the Attorney General's decision, not the contrary decision of the Board of Immigration Appeals, that should be considered the "agency interpretation" for *Chevron* purposes, but this is far from clear. *Chevron* requires deference to an administrative agency's interpretation of the statutes implementing the programs it administers. This stems from a recognition that Congress intends certain questions to be answered by expert administrative agencies. *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703, 115 S. Ct. 2407, 2415-16, 132 L.Ed.2d 597 (1995) (noting that "the degree of regulatory expertise necessary to [the] enforcement" of the Endangered Species Act counseled deference to an agency interpretation). Here, the immigration specialists at the Department of Justice adopted a view directly contrary to the Attorney General's view in *Soriano*. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-47 n. 30, 107 S. Ct. 1207, 1221 n. 30, 94 L.Ed.2d 434 (1987) (internal quotation marks omitted). On the other hand, it is the Attorney General

familiar formulation, "[i]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. at 2782.

We think it is a significant question whether the determination of the application of the effective date of a governing statute is the sort of policy matter which Congress intended the agency to decide and thus whether the doctrinal underpinnings of *Chevron* are present here. When Congress wants an agency to determine whether to apply new rules, it usually delegates that discretion expressly. *See, e.g.*, IIRIRA § 309(c)(2), (3) (giving the Attorney General discretion in some cases to determine whether to apply transitional or permanent rules). The question of whether AEDPA § 440(d) applies retroactively may be viewed as a "pure question of statutory construction for the courts to decide," *Cardoza-Fonseca*, 480 U.S. at 446, 107 S. Ct. at 1221, a question that is "quite different from the question of interpretation that arises in each case in which the agency is required to apply [statutory] standards to a particular set of facts" which involves the agency's particular expertise. *Id.* at 448, 107 S. Ct. at 1221. Nonetheless, we will assume arguendo that the Attorney General's opinion is subject to *Chevron* analysis.

Chevron, though, requires a two-step analysis. The Attorney General's argument for deference bypasses the first step, which is to determine whether Congress

---

rather than the BIA who is given final authority by Congress to oversee the immigration laws.

has provided an answer to the specific question presented. "If, by 'employing traditional tools of statutory construction,' we determine that Congress' intent is clear, 'that is the end of the matter.'" *Regions Hosp. v. Shalala*, —- U.S. ——, ——, 118 S. Ct. 909, 915, 139 L.Ed.2d 895 (1998) (quoting *Chevron*, 467 U.S. at 842-43, 104 S. Ct. at 2781-82). Those traditional tools of statutory construction include the familiar presumptions we employ, including *Landgraf*'s presumption against retroactivity.

A contrary approach would permit the executive branch effectively to thwart the intent of Congress, made plain through a careful reading of the statutory provision at issue in context, so long as the executive branch's interpretation was a plausible reading of isolated statutory terms. Instead, as *Chevron* itself made clear, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n. 9, 104 S. Ct. at 2781-82 n. 9.

The Supreme Court has consistently rejected agency arguments for deference which would impair the courts' ability to examine congressional intent using our "'traditional tools of statutory construction.'" *Regions Hosp.*, —- U.S. at —-, 118 S. Ct. at 915 (quoting *Chevron*, 467 U.S. at 843 n. 9, 104 S. Ct. at 2781-82 n. 9). Instead, to determine whether Congress intended AEDPA § 440(d) to apply to such pending applications, we examine that provision in the normal manner. We look to that section not in isolation, but in the context of Title IV of AEDPA (which contains its immigration provisions) and in light of Title IV's overall structure.

We are guided by *Landgraf* principles and seek a plain statement from Congress that expressly provides for retroactive application. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," not by looking at statutory terms in isolation. *Robinson v. Shell Oil Co.*, 519 U.S. 337, ——, 117 S. Ct. 843, 846, 136 L.Ed.2d 808 (1997). In *United States v. Rivera*, 131 F.3d 222 (1st Cir. 1997) (en banc), this court noted " 'the cardinal rule that a statute is to be read as a whole . . . , since the meaning of statutory language, plain or not, depends on context.' " *Id.* at 225 (quoting *Conroy v. Aniskoff*, 507 U.S. 511, 515, 113 S. Ct. 1562, 1565, 123 L.Ed.2d 229 (1993)).

We next examine AEDPA's legislative history, not as a substitute for examination of AEDPA's text, but only as a check to see that our initial textual interpretation does not conflict with "a clearly expressed legislative intention contrary to the statutory language which would require the court to question the strong presumption that Congress expresses its intent through the language it chooses." *Rivera*, 131 F.3d at 226 (citation, internal quotation marks and alterations omitted).

Throughout, our statutory analysis is guided by the Supreme Court's retroactivity jurisprudence. In *Landgraf, supra*, the Supreme Court noted that, while "a court is to apply the law in effect at the time it renders its decision," *id.* at 264, 114 S. Ct. at 1496 (internal quotation marks and citations omitted), there is a strong presumption "deeply rooted in our jurisprudence . . . and centuries older than our Republic" against

retroactivity. *Id.* at 265, 114 S. Ct. at 1497. The Attorney General's application of the new AEDPA restrictions takes away a form of relief that, while discretionary, is plainly substantive, and so implicates *Landgraf*'s presumption against retroactivity.[21] Such discretionary relief has been available in our system in some form since at least 1917; the origin of § 212(c) relief is in the Seventh Proviso to § 3 of the Immigration Act of 1917. *See Francis*, 532 F.2d at 270. In a substantial number of cases, aliens under deportation orders were granted such relief, usually on a showing that they had reformed their ways and become productive members of society. Indeed, from fiscal years 1989 through 1994, it appears that over half of all applications for § 212(c) relief were granted by the agency. *See Mojica v. Reno*, 970 F. Supp. 130, 178 (E.D.N.Y.1997).[22] AEDPA's restrictions on § 212(c)

---

[21] In *Kolster*, this court applied *Landgraf* principles and found no retroactivity problems in applying AEDPA § 440(a), which precluded judicial review in the courts of appeals for aliens who are deportable for having committed aggravated felonies, immediately. The question Goncalves raises concerning AEDPA § 440(d) is fundamentally distinct. *Kolster* concerned a purely jurisdictional statute. *Landgraf* makes clear that the "[a]pplication of a new jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case." *Landgraf*, 511 U.S. at 274, 114 S. Ct. at 1502 (internal quotation marks and citation omitted).

[22] The BIA was not bound by the decision of the IJ either as to law or fact, but could review the record de novo. *See Matter of Adetiba*, 20 I. & N. Dec. 506, 507, 1992 WL 195812 (BIA 1992). Goncalves followed this system. If the BIA had been permitted to hear his appeal on the merits, Goncalves would have argued that the IJ had given insufficient weight to the many favorable factors present in his case. *See Matter of Marin*, 16 I. & N. Dec. 581, 584-85 (listing factors).

relief, as applied to Goncalves, thus clearly raise retroactivity concerns, requiring a close examination of AEDPA's text to determine whether Congress has expressly chosen to make its restrictions retroactive.

B. Text

Title IV of AEDPA contains provisions restricting relief from deportation for two categories of aliens—aliens involved in terrorism and aliens convicted of ordinary crimes. Many of these provisions, with the notable exception of the provision of concern to us, AEDPA § 440(d), contain explicit subsections stating that they apply retroactively. We review these other provisions in determining whether Congress likewise intended to apply AEDPA § 440(d) retroactively. Two provisions restricting relief from deportation for aliens involved in terrorism, AEDPA §§ 413 and 421, are particularly helpful in this respect.

Under AEDPA § 413, alien terrorists[23] are made ineligible for several different forms of relief from deportation. That section contains an explicit "effective date" subsection, which provides:

---

[23] An alien terrorist is defined by AEDPA § 401(a) as any alien described in old INA § 241(a)(4)(B), now codified at 8 U.S.C.A. § 1227(a)(4)(B) (West Supp. 1998), which provides that "any alien who has engaged, is engaged, or at any time after entry engages in any terrorist activity . . . is deportable." Terrorist activity, in turn, is defined in old INA § 212(a)(3)(B)(iii), now codified at 8 U.S.C.A. § 1182(a)(3)(B)(iii) (West Supp. 1998). Goncalves does not fit this definition.

> The amendments made by this section shall take effect on the date of the enactment of this Act and shall apply to applications filed before, on, or after such date if final action has not been taken on them before such date.

Id. § 413(g). This language explicitly provides that the restrictions on relief from deportation imposed on alien terrorists should apply to all cases pending at the time of AEDPA's enactment, as long as "final action" had not yet been taken.

If Congress thought that such restrictions would as a matter of course be applied to pending cases, as the Attorney General's argument requires, then this provision would have accomplished nothing. In *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 137 L.Ed.2d 281 (1997), the Court noted "the cardinal principle of statutory construction that it is our duty to give effect, if possible, to every clause and word of a statute." *Id.* at ——, 117 S. Ct. at 1166 (citations, internal quotation marks and alterations omitted); *accord Walters v. Metropolitan Educ. Enters.*, 519 U.S. 202, ——, 117 S. Ct. 660, 664, 136 L.Ed.2d 644 (1997). This is particularly true when there is a contrast in language between two sections of the same statute. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Cardoza-Fonseca*, 480 U.S. at 432, 107 S. Ct. at 1213 (citation, internal quotation marks and alterations omitted).

The Attorney General responds by drawing a distinction between provisions restricting discretionary relief, such as § 440(d) (applicable here), and provisions restricting relief that she says involve no exercise of discretion. The Attorney General argues that discretionary relief, such as § 212(c) relief, is best analogized to prospective injunctive relief, restrictions of which, under *Landgraf*'s judicial default rules, are generally held to be applicable immediately and not to present any retroactivity concerns. *See Landgraf*, 511 U.S. at 273-74, 114 S. Ct. at 1501-02. Thus, the Attorney General concludes, Congress would have expected restrictions on such discretionary relief to apply to pending cases even in the absence of an explicit "effective date" provision, and would have felt no need to include an express provision making those restrictions retroactive.

By contrast, the Attorney General continues, AEDPA § 413 restricts several forms of relief for alien terrorists, not all of which are discretionary. In the absence of an explicit "effective date" provision, the Attorney General concludes, Congress would expect the courts to apply *Landgraf*'s normal presumption against retroactivity. This, she says, explains the difference between § 413, denying relief for alien terrorists, and § 440(d), denying relief for aliens convicted of ordinary crimes.

The Attorney General's argument both misinterprets *Landgraf* and fails on its own terms. The argument misinterprets *Landgraf* because it effectively would apply a presumption in favor of retroactive application to any restriction of relief that could be described as "discretionary." The argument fails to recognize that

"the only 'presumption' mentioned in that opinion is a general presumption *against* retroactivity." *Hughes Aircraft*, — U.S. at —, 117 S. Ct. at 1878. Following the Attorney General's position would have significant consequences. It would require Congress to draft an explicit "effective date" provision to ensure against retroactive application in any case in which a statute takes away relief to which a party was not automatically entitled. But *Landgraf* requires an express congressional command only to overcome its presumption against retroactivity, not to ensure application of a statutory term prospectively. *See Lindh v. Murphy*, — U.S. —, —, 117 S. Ct. 2059, 2062, 138 L.Ed.2d 481 (1997).

Indeed, in *Landgraf* itself a similar argument was made and rejected by the Supreme Court. *Landgraf* refused to apply amendments to Title VII that enlarged the damages that could be awarded to victims of discrimination retroactively, despite the fact that the employer would only face liability if he engaged in conduct that was at the time illegal. "Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Landgraf*, 511 U.S. at 282-83 n. 35, 114 S. Ct. at 1506 n. 35. Similarly, in *Hughes Aircraft*, the Court again rejected an argument that a statute is not retroactive if the conduct for which it imposes additional consequences was already unlawful, and thus the defendant had no "right" to engage in such conduct. The *Hughes Aircraft* Court nevertheless determined that the unfairness of imposing "additional burdens" on such conduct retroactively invoked the *Landgraf* presumption. *See id.* at —— - ——, 117 S. Ct. at 1876-77.

Thus, that Goncalves' crimes made him deportable prior to the passage of AEDPA and that the new restrictions merely eliminated a possible form of relief from those consequences, do not suffice to rebut the presumption against retroactivity.

Similarly, the Attorney General's reliance on a description in *Landgraf* of the kinds of statutes that often provoke retroactivity concerns is misplaced. In *Landgraf*, the Court noted, with approval, Justice Story's "influential definition" of impermissibly retroactive statutes:

> Every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.

Landgraf, 511 U.S. at 269, 114 S. Ct. at 1499 (citations and internal quotation marks omitted). In *Hughes Aircraft*, however, the Court expressly held that this language "does not purport to define the outer limit of retroactivity;" that such effects on what may be considered "vested rights" "constitute[ ] a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity." 520 U.S. at ——, 117 S. Ct. at 1876. The Attorney General's reliance on the fact that aliens have no "vested right" to discretionary relief thus "simply misreads [the Court's] opinion in *Landgraf*," *id.*, converting it from an opinion urging against retroactive application to an opinion requiring special congressional attention to *avoid* retroactive application. Although crimes "involving moral turpitude" did expose Goncalves to deportation before

AEDPA, he had a statutory right to apply for § 212(c) relief unless he had committed an aggravated felony. To preclude Goncalves from applying for such relief now plainly "attaches a new disability" and imposes additional burdens on past conduct. *Hughes Aircraft*, 520 U.S. at ——, 117 S. Ct. at 1876 (quoting *Landgraf*, 511 U.S. at 269, 114 S. Ct. at 1499).

Even if Supreme Court precedent permitted this type of analysis, which it does not, the Attorney General's argument fails on its own terms. She says that the reason alien terrorists are subject to a specific retroactivity provision applying the new restrictions to pending applications (and criminal aliens are not) is that the forms of relief that AEDPA precludes for alien terrorists were not discretionary. In this, the Attorney General misreads the statute.

Alien terrorists had been eligible for certain forms of discretionary relief, and Congress nevertheless provided expressly for application of the new restrictions on these forms of relief to pending applications. Of the five forms of relief from deportation precluded by § 413, only one, "withholding of deportation," is a form of relief to which an alien is entitled if eligible. The rest were committed to the discretion of the Attorney General.[24] Thus, except for the relief precluded by

---

[24] The forms of relief that are precluded by § 413, applicable to alien terrorists, include "withholding of deportation" under old INA § 243(h)(1) (entitling an alien who is "likely" to face persecution in his home country to relief from deportation), and "suspension of deportation" under old INA § 244(a) (giving discretion to the Attorney General to suspend deportation in certain circumstances causing "exceptional and extremely unusual hardship" to close family members). In addition, AEDPA § 413 makes

AEDPA § 413(a), all of the relief precluded by § 413 was discretionary relief. The fact that § 413 contains an "effective date" subsection that applies to the entire section suggests that Congress thought it was necessary to be explicit in making the new restrictions applicable to pending applications for relief, regardless of whether the relief was discretionary or mandatory; otherwise, the retroactivity provision would not be needed.

Finally, in another section, Congress explicitly made a restriction on discretionary relief retroactive through an express "effective date" provision. *See* AEDPA § 421. As that section concerns only asylum applications, under the Attorney General's reading no "effective date" provision would be needed because asylum is a discretionary form of relief. *See Cardoza-Fonseca*, 480 U.S. at 428-29 & n. 6, 107 S. Ct. at 1211-12 & n. 6. Thus, § 421 confirms our reading; Congress did not draft express retroactivity provisions only for mandatory forms of relief.

---

aliens involved in terrorism ineligible to apply for "voluntary departure" under old INA § 244(e)(1) (giving discretion to the Attorney General in certain circumstances to allow deportable aliens to leave the country voluntarily and thus avoid the negative legal consequences of formal deportation). They are also made ineligible to adjust their status from a nonimmigrant status to that of an alien lawfully admitted for permanent residence under old INA § 245(a), which is a discretionary form of relief, or to apply to have their admission to this country recorded as lawful, despite the lack of such a record, if they were admitted prior to certain dates under old INA § 249, also a form of relief that is committed to the discretion of the Attorney General.

Thus, Congress expected, unless it said to the contrary, that new restrictions would not be applied retroactively to pending applications. This is the most natural reading of Congress' decision to include language in §§ 413 and 421 making the new restrictions applicable to the pending applications of alien terrorists, but omitting such language in § 440(d), the provision denying relief to aliens convicted of specified criminal offenses. Furthermore, Congress did not treat discretionary restrictions on relief differently than restrictions on other forms of relief. The Attorney General offers no other alternative explanation for the different language that the statute uses in dealing with these two categories of alien offenders.

Our interpretation is eminently rational when tested in light of Congress' principal purposes in enacting AEDPA. Those purposes are announced in the Act's title—preventing terrorism and providing for an "effective" death penalty. *See* AEDPA § 1. Congress could well have decided that the unfairness of upsetting settled expectations was outweighed by the importance of fighting terrorism, while deciding against making retroactive the new restrictions on § 212(c) relief for aliens who are not terrorists but are convicted of ordinary crimes.

C. Legislative History

We examine AEDPA's legislative history to determine whether we have erred in our interpretation of the text. *See Landgraf*, 511 U.S. at 262, 114 S. Ct. at 1495 (permitting resort to legislative history to confirm textual analysis); *Cardoza-Fonseca*, 480 U.S. at 432-33, 107 S. Ct. at 1213-14; *Rivera*, 131 F.3d at 226. We do so

only to determine if there is a clearly expressed legislative intention contrary to our textual reading, not as a substitute for a textual analysis. *See Rivera*, 131 F.3d at 226. The history of AEDPA, far from demonstrating a clearly expressed contrary intent, further demonstrates Congress' attention to "effective date" provisions and thus supports our reading of AEDPA's text.

One of the most striking things about the legislative history is that the original Senate version of the bill which became AEDPA did contain express language making the provision which became AEDPA § 440(d) retroactive; but this language was eliminated by the conference committee and was *not* included in the final bill. The origins of § 440(d) were in 1995, when Senators Dole and Hatch and several co-sponsors introduced the restriction on § 212(c) relief that became AEDPA § 440(d). The restriction was introduced as part of an amendment in the nature of a substitute for their own antiterrorism bill, S. 735, 104th Cong. (1995) (the "Senate bill"). *See* 141 Cong. Rec. S7553 (daily ed. May 25, 1995) (text of amendment). That amended Senate bill, at § 303(e)(4), contained the provision that later became AEDPA § 440(d), limiting relief for aliens convicted of ordinary crimes. Within that section, § 303(f) then provided:

> The amendments made by this section [i.e., § 303 of the Senate bill] shall take effect on the date of the enactment of this Act and shall apply to cases pending before, on, or after such date of enactment.

141 Cong. Rec. S7559 (daily ed. May 25, 1995). Thus, the amended Senate bill contained an "effective date" provision, expressly applicable to what later became AEDPA § 440(d), which provided for retroactive appli-

cation of its restrictions on § 212(c) relief.[25] The language is strikingly similar to what later became AEDPA § 413, the provision restricting relief for alien terrorists. The full Senate passed this version of the Senate bill on June 7, 1995. *See* 141 Cong. Rec. S7857, S7863 (daily ed. June 7, 1995).

Meanwhile, the House of Representatives was considering a different version of the antiterrorism bill, H.R. 2703, 104th Cong. (1996) (the "House bill"). Like the Senate bill, the House bill contained provisions restricting relief from deportation both for terrorists and for aliens convicted of ordinary crimes. However, in the case of ordinary crimes, the House bill only eliminated § 212(c) relief for aliens convicted of more serious crimes and was prospective.[26] *See* H.R. 2703, 104th Cong. § 662 (1996), at 142 Cong. Rec. H2295 (daily

---

[25] The fact that the Senate bill contained such a subsection is a telling refutation of the Attorney General's argument that the Congress did not believe that such a subsection was necessary for provisions limiting discretionary relief.

[26] The House bill's provisions limiting relief for aliens convicted of ordinary crimes had its origins in H.R. 668, the "Criminal Alien Deportation Improvements Act of 1995." H.R. 668 was included as subtitle E of title VI of the House bill, H.R. 2703. The House version restricted relief by expanding the definition of "aggravated felony," which under old INA § 212(c) made an alien ineligible to apply for such relief. *See* H.R. 2703, 104th Cong., § 662, at 142 Cong. Rec. H2295 (daily ed. Mar. 14, 1996). The House bill was crafted to eliminate the availability of § 212(c) relief for violent and other serious offenders. *See* H.R. Rep. 104-22, at 7-9 (1995). The House bill did not eliminate § 212(c) relief for permanent residents who committed less serious crimes that might nevertheless be said to "involve moral turpitude." Thus, under the House bill, Goncalves' application for discretionary relief would still be heard by the BIA.

ed. Mar. 14, 1996). By contrast, the House bill, like the final legislation, contained explicit "effective date" subsections in its provisions limiting relief for alien terrorists which made those restrictions retroactive. *See* H.R. 2703 §§ 611(b), 612(f), at 142 Cong. Rec. H2293, H2294 (daily ed. Mar. 14, 1996) (House bill provisions corresponding to AEDPA §§ 421(b) and 413(g), respectively). When the Senate bill was called up on the House floor on March 14, 1996, the House amended the Senate bill by replacing its text with the text of the House version. *See* 142 Cong. Rec. H2268, H2304 (daily ed. Mar. 14, 1996). The House asked for a conference with the Senate, insisting on its version of the legislation. *See id.* at H2304.

One month later, a bipartisan conference committee emerged with a compromise in the form of AEDPA § 440. The legislation contained both the House bill's expanded definition of "aggravated felony" and the Senate bill's restrictions on § 212(c) relief for aliens convicted of ordinary "crimes involving moral turpitude," but notably did not contain the Senate bill's original language making those restrictions retroactive. *See* H.R.Rep. No. 104-518, at 119 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 952 (adopting § 303(e)(4) of the Senate bill without adopting § 303(f), the subsection that made those restrictions applicable to pending cases). The legislation also contained the House version of the provisions eliminating relief for alien terrorists, and the House language making *those* provisions retroactive. A contrast in statutory language is "particularly telling" when it represents a decision by a conference committee to resolve a dispute in two versions of a bill, and the committee's choice is then approved by both Houses of Congress. *See FEC v. NRA Political*

Victory Fund, 513 U.S. 88, 95, 115 S. Ct. 537, 541-42, 130 L.Ed.2d 439 (1994).

This chronology also illustrates a second important point: Congress' awareness of the issue of whether restrictions on relief should be applied retroactively. In the final legislation, Congress decided to provide for such retroactive application in §§ 413 and 421, but not in § 440(d), a position consistent with the House approach of treating the two categories of aliens differently with respect to AEDPA's temporal reach. "'Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language.'" *Rivera*, 131 F.3d at 227 (quoting *Cardoza-Fonseca*, 480 U.S. at 442-43, 107 S. Ct. at 1218-19); *cf. Lonchar v. Thomas*, 517 U.S. 314, 325-27, 116 S. Ct. 1293, 1300, 134 L.Ed.2d 440 (1996) (courts should not read habeas statute to impose a requirement that Congress expressly "*rejected*, by removing [it] from the draft Rule"). Adopting the Attorney General's interpretation would require us to do precisely that, upsetting a compromise provision that was intended to reconcile the House's and Senate's very different approaches to aliens convicted of crimes.

A third point emerges from the legislative history. We note that Congress amended AEDPA § 440(d) when it enacted IIRIRA on September 30, 1996. *See* IIRIRA § 306(d). Three months earlier, on June 27, the BIA had determined that Congress did not intend AEDPA § 440(d) to apply to pending cases. Significantly, the very same Congress that had enacted AEDPA just five months earlier, on April 24, did not take the opportunity to overrule that BIA decision by

providing expressly that the new restrictions were fully retroactive and applied to pending cases. This was true even though Congress specifically amended AEDPA § 440(d) in other respects and was presumptively aware of what was then the governing agency interpretation. *Cf. Lorillard v. Pons*, 434 U.S. 575, 580, 98 S. Ct. 866, 869-70, 55 L.Ed.2d 40 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (citations omitted)). Such subsequent legislative developments, although never determinative in themselves, can be "significant" clues to congressional intent. *See Cardoza-Fonseca*, 480 U.S. at 430, 107 S. Ct. at 1212; *Sweet Home Chapter*, 515 U.S. at 700-01, 115 S. Ct. at 2414-15. This is particularly so when the amendment to AEDPA § 440(d) was enacted by the same Congress and was enacted after an agency had interpreted the statute in a way which would have required a more explicit statutory statement if Congress intended the statute to be interpreted differently. *Cf. Cardoza-Fonseca*, 480 U.S. at 430, 107 S. Ct. at 1212 (relying on the actions of *subsequent* congresses as clues to legislative intent); *Sweet Home Chapter*, 515 U.S. at 700-01, 115 S. Ct. at 2414-15 (same); *Lomas Mortgage, Inc. v. Louis*, 82 F.3d 1, 6-7 (1st Cir. 1996).

"We find these ordinary canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449, 107 S. Ct. at 1222. A careful reading of the text of AEDPA, confirmed by an examination of its legislative history, demonstrates that Congress did not intend AEDPA § 440(d) to apply

retroactively to pending applications for § 212(c) relief by persons convicted of ordinary "crimes involving moral turpitude."

V. Conclusion

Despite the length of this opinion, our holding is narrow. The district court had jurisdiction over Goncalves' petition for a writ of habeas corpus under 28 U.S.C. § 2241 given the precise nature of the claims asserted. The scope of that habeas jurisdiction is not limited to constitutional claims, but encompasses at least the pure issues of law concerning the applicability of statutory provisions to pending cases which Goncalves has raised. We have rejected an argument that there is no jurisdiction to consider these pure issues of law merely because Goncalves is not entitled to relief from deportation. Rather the question is whether he is entitled to be considered for such relief, and we have determined that he is. However, we need not reach the issue of what review (if any) may be available on habeas in cases when an alien attempts to obtain review of an individual § 212(c) or "cancellation of removal" determination by styling it as a pure issue of law, except to note that Congress apparently intended the scope of such review, if any, to be narrower than the "abuse of discretion" review that was formerly available under old INA § 106, at least for aliens subject to the permanent rules.

We have also determined, through a careful reading of AEDPA's text, confirmed by its legislative history, that Congress did not intend AEDPA § 440(d) to apply retroactively to persons in Goncalves' position. We do not reach Goncalves' constitutional challenges.

The judgment of the district court is *reversed*, and Goncalves' petition for a writ of habeas corpus is *granted* to this extent: the case is *remanded* to the Board of Immigration Appeals for a discretionary determination of the merits of Goncalves' application for relief under old INA § 212(c). It is, of course, up to the Attorney General, through the BIA, whether to exercise her discretion to allow Goncalves to avoid deportation.

APPENDIX B

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
JFK FEDERAL BLDG., ROOM 320
BOSTON, MA 02203

In the Matter of: GONCALVES, RAUL PERCIRA	Case No.: A34-282-192 Docket: BOSTON, MASSACHUSETTS
RESPONDENT	IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Jan 20, 1995.
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

(✓) The respondent was ordered deported to Portugal

( ) Respondent's application for voluntary departure was denied and respondent was ordered deported to

( ) Respondent's application for voluntary departure was granted until with an alternate order of deportation to or

( ) Respondent's application for asylum was ( )granted ( )denied ( )withdrawn ( )other.

( ) Respondent's application for withholding of deportation was ( )granted ( )denied ( ) withdrawn ( )other.

( ) Respondent's application for suspension of deportation was ( )granted ( )denied ( )withdrawn ( )other.

(✓) Respondent's application for waiver under Section 212 c of the Immigration and Nationality Act was ( )granted (✓)denied ( )withdrawn ( )other.

( ) Respondent's application for_____was ( )granted ( )denied ( )withdrawn ( )other.

( ) Proceedings were terminated.

( ) The application for adjustment of status under Section (216) (216A) (245) (249) was ( )granted (-)denied ( )withdrawn ( )other.
If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

( ) Respondent's status was rescinded under Section 246.

(✓) Other R reserves rt to appeal due by 1/30/95.

( ) Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

/s/ LEONARD I. SHAPIRO
LEONARD I. SHAPIRO
Immigration Judge
Date: Jan 20, 1995

Appeal: WAIVED (A [I] B)

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Boston, Massachusetts

File No.: A 34 282 192 January 20, 1995

IN THE MATTER OF RAUL PERCIRA GONCALVES

RESPONDENT

IN DEPORTATION PROCEEDINGS

CHARGE: Section 241(a) (4) of the Immigration and Nationality Act [redesignated as Section 241(a) (2) (A) (ii) of the Immigration and Nationality Act by the Immigration Act of 1990] - convicted of two or more crimes involving moral turpitude.

APPLICATIONS: I&N Act - Section 212(c) - waiver of inadmissability.

ON BEHALF OF RESPONDENT:

Kathleen M. Curley, Esquire
145 Munro East, Suite 300
Lynn, Mass. 01901-1222

ON BEHALF OF SERVICE:

Frank J. Crowley, Esquire
JFK Federal Building
Room 425
Government Center
Boston, Mass. 02203

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent herein is a 26-year-old single, native and citizen of Portugal. Deportation proceedings were instituted against him when the Immigration and Naturalization Service issued an Order to Show Cause on December 11, 1990, in accordance with the provisions of 8 C.F.R. Section 242.1(a), as amended and supplemented by a form I-261, additional charge of deportability, issued on July 11, 1994, in accordance with the provisions of 8 C.F.R. Section 242.16(d) (Please *see* Exhibits R-1 and R-1a). By way of these documents, the Immigration Service contends that the respondent is deportable on the charge set forth above.

During the course of the hearing, the respondent, through counsel, admitted the truth of factual allegations 1 through 4 and factual allegation 6 in the Order to Show Cause, admitted the truth of factual allegations 5 which was added by way of the form I-261, and conceded deportability as charged in the Order to Show Cause and additional charge of deportability. In addition, the respondent designated Portugal as the country for deportation purposes if necessary (*See* Exhibit R-2).

Based upon these admissions and the respondent's concession of deportability, I find that deportability has been established by clear, convincing, and unequivocal evidence.

The respondent has submitted an application for a waiver of inadmissability pursuant to the provisions of Section 212(c) of the Immigration and Nationality Act (*See* Exhibit R-4, as supplemented by Exhibits R-4a, R-5 and R-6 through 9). Upon the basis of the evidence of record, I find that the respondent is statutorily eligible for a waiver under Section 212(c) of the Immigration

and Nationality Act and the only issue which must be resolved is whether he has established that the requested relief should be granted in the outsize [*sic*: exercise] the outsize of discretion.

In reaching a decision in this case, I have taken into consideration the following factors as reflected by the testimony at the hearing and the documentary evidence of record:

The respondent has resided in the United States for the past 22 years, ever since having arrived in this country as a lawful permanent resident alien when he was three and a half years old.

The respondent's family in the United States consists of his mother and two brothers, both of whom are lawful permanent resident aliens, a sister-in-law, and two nephews who are presumably United States citizens.

The respondent alleges that at the present time he lives with his married brother here in the Commonwealth of Massachusetts, and that during the week while he's employed by his brother as a construction worker on the island of Nantucket, that he and his brother live together in an apartment with the project director. However, the respondent alleges that on weekends, he and his brother return to his brother's home where they spend the weekends with the family of the respondent's brother.

According to the testimony of the respondent's brother, the respondent now has become family oriented and interacts to a large extent with the family and with his nephews who are now ages 6 and 8.

The respondent's mother has been, of recent years, residing in a group home as a result of mental illness

from which she suffers, and it is said that the respondent's brother Carlos, presently resides in South Carolina. However there is evidence that the brother Carlos has been ordered to be deported from the United States.

It is the respondent's contention that he came to the United States when he was an infant and does not even remember arriving in this country. He says that he came with his mother and his brothers and perhaps his father and that his father died when he was but five years old.

The respondent further says that his mother worked until he was approximately 12 years old, and then because of her mental illness she had to stop working and the family lived on welfare.

The respondent says that as a result of his mother's mental illness and the manifestations thereof, including loud and violent outburst, he came to feel ashamed, scared and confused and while he attended school in Falmouth up until that period of time, he began drinking and skipping school and began to become involved in criminal trouble. In addition, during that period of time, and for quite a period thereafter, the respondent stayed away from home and lived with friends or with whomever provided him with what apparently consisted of temporary shelter.

The respondent does allege that when he was in foster care for some period of time, that he stopped getting into trouble. However, he says that he has a serious drinking problem which has been the source of all of his criminal and anti-social behavior. He says that when he drank, he became drunk and got crazy and got into trouble. He alleges that he was always drunk

when he committed the crimes and that it was never suggested to him in court that he stop drinking.

From the time that the respondent was 12 years old and continuing up until his most recent incarceration in 1991, he has been involved in an astounding series of criminal activities.

The respondent's crimes which extend over a period of some 12 years consist of larceny, receiving stolen property, motor vehicle and insurance violations, operating after his license was suspended, and operating to endanger, operating while under the influence, assault, and most significantly are crimes of breaking and entering into homes of private citizens and into stores and shops.

According to his testimony, the respondent was incarcerated for the first time in 1987 for having broken and entered into a house in Falmouth. The probation record reflects that upon each of his convictions the respondent was convicted for several different breaks and according to his testimony, he was breaking into houses in order to get money to party with his friends. The 1987 conviction involved a series of events which took place during a one week period.

Thereafter, and after the respondent had served one year of a two year sentence, and after he was released in 1988 he was arrested and charged with parole violation ostenisbly because of an assault and battery. He had only been out of jail for a few months when he was re-arrested and sent back to prison.

After his release, at some point in time, late in 1988 or early 1990 and when he had been out of prison for approximately 19 months, the respondent was once again, arrested and convicted for breaking and enter-

ing, most specifically into a True Value Hardware store and was given a 10 to 12 year sentence. The respondent served some three years of this sentence and was released from incarceration in July of 1994. It appears as though he might have been in state custody until May of 1994 and then was held in INS custody until July of 1994.

The respondent says that since his release in July of 1994 he has recognized his alcohol problem, has continued with Alcoholics Anonymous program that he started in prison and that he has recognized the source of his problem and what needs to be done to resolve it.

As previously mentioned, the respondent now works for a construction company in Nantucket through his brother's good offices and he is paid as a sub-contractor. That is to say the he is paid in cash and is required to report all of the income that he receives on his own income tax returns.

The respondent has submitted a proposed income tax return for the year 1994 as evidence of his intention to pay income taxes. I will accept this as constituting evidence of his intention to pay taxes for the tax year 1994 and I would also make note of the fact that one who is self employed is required to file quarterly estimated income tax returns and to deposit money with the Federal Government for purposes of securing tax payments and not to squirrel money away in the home as is the practice adopted by the respondent. However, at this point in time and inasmuch as the respondent has generally not had a great deal of work experience in the past, I wll attribute this to the fact he is unaware of what must be done with respect to income tax quarterly payments.

The respondent, while he has had some jobs over the past 12 years or so, has really only been employed sporadically and has devoted all of his energies to breaking the laws of the United States.

The respondent's brother testified on his behalf that since his release from incarceration, the respondent has been working on a daily basis, has demonstrated that he is a great worker, shows up every day and he is a much kinder person at the present time. The respondent brother says that he has seen a great change in the respondent since his release from incarceration.

The respondent himself says that he now recognizes that what he has done is wrong, that he apologizes for same, and he would like to have an opportunity to live and work in the United States.

During the time of his incarceration the respondent was cited for one disciplinary infraction for failure to obey orders and on the other hand he also devoted much of his time toward obtaining a GED degree and to attending Alcoholics Anonymous and Narcotic Anonymous programs.

The respondent has very few, if any ties to Portugal in that he has not returned to that country since his arrival in the United States. He does have at least one aunt and one uncle who reside in Portugal, those being apparently the brother and sister of his mother.

The respondent is in good health, does not own any property in the United States, has no other immigration violations, has never received welfare, has never been a member or the military forces of the United States and has not participated in any community activities.

With respect to the issue of rehabilitation while I recognize and commend the behavior of the respondent since his last release from incarceration, I think it is clear to say it is way too early to conclude that the respondent is in fact rehabilitated. In fact, during the entire history of his residence in the United States, he has repeatedly been in and out of jails, been charged with crimes which in the opinion of the court are egregious and has generally terrorized each community in which he has resided. The respondent has, in part, attributed his behavior to his mother's illness and to the lack of supervision during his youth, and while this is a terribly tragic situation, as evidenced by the respondent's brother, the circumstances of his upbringing need not have resulted in a criminal career.

The respondent's brother is an upstanding citizen and family man who has established a business, who is well spoken and articulate and is commendably loyal to his brother.

The respondent, on the other hand, has by his behavior, violated the privilege which was extended to him to be able to live and work in the greatest county in the world. The respondent has not only committed crimes in order to obtain money but in doing so has violated the very sanctity and security of people's homes. It is this sort of behavior which has led to the general breakdown of our society at the present time in that people are not only afraid to walk on the streets for fear of what might happen to them but they, at least, are able to keep in the back of their minds that once they reach the safety of their homes, that they will be able to lead a safe and high quality life. The very idea of a human being who is able to break into another persons home and to ransack it in order to steal the property of

those hard working and decent people is behond my ability to understand. I always thought that there must be some degree of evil which transcends that necessity of committing a crime for the purpose of obtaining money.

Imagine, if you will, breaking into a hardware store of a hard working entrepreneur who has devoted his or her whole life to the building up of a business, who wakes up and gets to work early in the morning and stays and works late at night, just manages to pay all the bills and makes a life for him or herself, and then receives a phone call that their business operation has been violated and broken into and their goods and money stolen. Imagine, if you will, the grief and emotional upset of these people of having now to repair the damage done to their profit and to suffer losses from their own families income because some individual needed money to party with his friends.

I do believe that this sort of criminal activity does reflect a lack of character and integrity which is so pervasive as to require extensive evidence or rehabilitation in order to wipe out the damage and destruction caused in the past.

Certainly the respondent will suffer what I would think to be a serious hardship if he were to be deported from the United States to Portugal. I recognize the fact that he will be separated from his immediate and closet family and be required to return to a country to which he has very few if any ties. On the other hand, the respondent has acquired skills in the United States of which he can avail himself and does at least have an aunt and uncle who might be able to help him in the transition period of his readjustment to another society.

I also recognize that it would be a hardship on his mother and the rest of his family to be separated from the respondent, especially in light of the fact that apparently the respondent's other brother has also been deported from the United States. However, I consider the behavior of the respondent for the past 12 years to be so evil and that I cannot find that the positive and equitable factors that he has demonstrated are sufficient to outweigh his behavior.

As pointed out by the counsel for the Immigration Service, the respondent was placed in deportation proceedings in December of 1990, and knowing that he was facing deportation from the United States he still continued on his course of criminal behavior without regard to the consequences of his actions. Also, even after he was released from jail on previous occasions, he was rearrested and reconvicted of crimes within a short period of time and was recommitted to jail therefore.

The respondent has had numerous opportunities to reform his behavior in the past and has failed to do so. I do take this as being evidentiary of his inability to do so in the future, while all the while hoping that his participation in an Alcoholics Anonymous program and his increased maturity will help him towards rehabilitation. In any event, this is speculative at best.

To the extent that it might be argued that the respondent is required to establish unusual or outstanding equities in order to have discretion exercised favorably on his behalf, I do conclude that his length of residence in the United States, especially inasmuch as it began when he was just three and a half years old, does constitute such an unusual or outstanding equity. Furthermore, when this is combined with the fact that the respondent has never returned to Portugal it

clearly does rise to the level of unusual and/or outstanding.

However, in weighing these circumstances along with the other equities established by the respondent, I find that they are outweighed by the length and nature and extent of his criminal behavior and activities in the United States and I do not find that discretion ought to be exercised favorably with respect to the respondent herein.

One can only hope that the respondent is, as he contends, on the way to his rehabilitation. In any event, the respondent has come too far at this point to be worthy of remaining in the United States and accordingly the following orders will be entered:

ORDER

IT IS HEREBY ORDERED that the respondent's application for a waiver of inadmissibility pursuant to the provisions of Section 212(c) of the Immigration and Nationality Act be and the same is hereby denied.

IT IS FURTHER ORDERED that the respondent be deported from the United States to Portugal on the charge contained in the Order to Show Cause as amended by form I-261.

/s/ LEONARD I. SHAPIRO
LEONARD I. SHAPIRO
Immigration Judge

APPENDIX D

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A34-282-192 – BOS Date: MAR 24 1997

In re: GONCALVES, RAUL PERCIRA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

CURLEY, KATHLEEN M.
145 Munroe St. Suite 300,
Lynn, MA 01901-1222

APPLICATION: Waiver of inadmissibility

ORDER:

PER CURIAM. You are seeking relief from deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). However, you are

statutorily ineligble for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)." *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") § 440(d); *Matter of Soriano*, Interim Decision 3289 (A.G., Feb. 21, 1997). Accordingly, your appeal is dismissed.

/s/ PAUL W. SCHMIDT
PAUL W. SCHMIDT
FOR THE BOARD

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NUMBER 97-11795-RGS

RAUL PERCIRA GONCALVES

v.

JANET RENO, ET AL.

MEMORANDUM ORDER ON PETITION FOR A WRIT OF HABEAS CORPUS AND STAY OF DEPORTATION

AUGUST 14, 1997

STEARNS, D.J.

After a hearing, and after consideration of the pleadings, and in particular, the comprehensive and thorough memorandum of law filed by Special Assistant U.S. Attorney Crowley on behalf of the Immigration and Naturalization Service, I determine as follows.

I agree with the government that the district court is divested of statutory jurisdiction by operation of 8 U.S.C. § 1105a which commits review of a final order of deportation to the Circuit Court of Appeals. See *Agosto v. Immigration & Naturalization Service*, 436 U.S. 748, 752-753 (1978). I also note that it appears uncontested that petitioner failed to seek such review within the thirty days authorized by § 309(c)(4)(C) of

the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

I am inclined to agree with the government that amended § 242(g) of the Immigration and Nationality Act (8 U.S.C. § 1252(g)) divests the district court of subject matter jurisdiction, in that petitioner's request for a stay of deportation arises from a decision by the Attorney General to execute a removal order. See *Auguste v. Attorney General*, 1997 WL 400970 (11th Cir. 1997).

Finally, to the extent that the district [court] retains a residual power to provide habeas corpus review of constitutional claims, cf. *Kolster v. INS*, 101 F.3d 785, 790-791 (1st Cir. 1996), I agree with the government that petitioner has presented no claim of a substantial enough nature to warrant relief. See *Mbiya v. Immigration & Naturalization Service*, 930 F. Supp. 609, 612 (N.D. Ga. 1996). First, the Attorney General's determination that § 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 applies retroactively to cases pending on its enactment is manifestly correct. See *Kolster*, supra, 101 F.3d at 789. Second, the distinction drawn by Congress between excludable and deportable aliens rest on a "facially legitimate and bona fide reason," and therefore does not violate the Equal Protection Clause. See *Fiallo v. Bell*, 430 U.S. 787, 794 (1977).

ORDER

For the foregoing reasons, the motion to dismiss is ALLOWED. The motion to stay deportation is DENIED.

SO ORDERED.

/s/ RICHARD G. STEARNS
RICHARD G. STEARNS
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNTIED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 97-11795-RGS

RAUL PERCIRA GONCALVES

v.

JANET RENO, ET AL.

ORDER OF DISMISSAL

STEARNS, DJ. AUGUST 14, 1997

In accordance with this Court's Memorandum and Order on Petition for a Writ of Habeas Corpus and Stay of Deportation issued this date,

IT IS HEREBY ORDERED: The Petition is hereby DISMISSED. The Motion to Stay Deportation is DENIED.

SO ORDERED.

/s/ RICHARD G. STEARNS
RICHARD G. STEARNS
UNITED STATES DISTRICT JUDGE

By:

/s/ MARY JOHNSON ROBBINS
MARY JOHNSON ROBBINS
Deputy Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1953

RAUL PERCIRA GONCALVES,
PLAINTIFF, APPELLANT

v.

JANET RENO, ATTORNEY GENERAL;
DORIS MEISSNER, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE; DISTRICT, BOSTON DISTRICT INS; DEPARTMENT OF JUSTICE, AND IMMIGRATION AND NATURALIZATION SERVICE.
DEFENDANTS, APPELLEES

Before: TORRUELLA, *Chief Judge*, CAMPBELL, *Senior Circuit Judge*, and SELYA, BOUDIN, STAHL, LYNCH, *Circuit Judges*

ORDER OF COURT

Entered. July 31, 1998

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considerated by the judges of this Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Phoebe D. Morse, Clerk.

By JANICE M. O'NEIL
JANICE M. O'NEIL
Chief Deputy Clerk

[cc: Messrs. Watt, Gelernt, Stern, Crowley, Duffy, Howard, Vargas]

APPENDIX H

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Suspension of Habeas Corpus Clause of the United States Constitution, Art. I, § 9, Cl. 2, provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. Prior to April 24, 1996, section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) (1994), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> **(10) Habeas corpus**
>
> any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

3. After April 24, 1996, and before September 30, 1996, Section 106(a) of the Immigration and Nationality

Act, 8 U.S.C. 1105a(a) (to be codified), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> (10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by section [1251](a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are covered by section [1251](a)(2)(A)(i), shall not be subject to review by any court.

4. Prior to April 24, 1996, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), provided:

> **Nonapplicability of subsection (a)**
>
> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General

without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

5. Effective April 24, 1996,[1] Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (to be codified), provided:

Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General

---

[1] Section 212(c) was amended by Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, on April 24, 1996. Further technical amendments were made by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, on September 30, 1996, and those technical amendments were made effective as if they were enacted on the original enactment date of AEDPA. See p. 87a, *infra*. The version set forth in the text reflects both sets of amendments. In addition, Section 304(b) of IIRIRA, 110 Stat. 3009-597, repealed Section 212(c) entirely, but Sections 306 and 309 of IIRIRA, 110 Stat. 3009-607, 3009-625, make clear that this repeal applies only to aliens placed in removal proceedings on or after April 1, 1997. See pp. 86a-89a, *infra*.

without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered by section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2) (A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section [1251](a)(2)(A)(i).

6. Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252 (Supp. II 1996), provides in pertinent part:

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

* * * * *

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law, no court shall

have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

7. Section 401(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268 (Apr. 24, 1996), provides:

> ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS.—Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) is amended—
>
> (1) in paragraph (8), by adding "and" at the end;
>
> (2) in paragraph (9), by striking "; and" at the end and inserting a period; and
>
> (3) by striking paragraph (10).

8. Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276 (Apr. 24, 1996), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996),[2] provides in pertinent part:

> **CRIMINAL ALIEN REMOVAL.**
>
> (a) JUDICIAL REVIEW.—Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:

---

[2] Section 306(d) of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, made certain technical amendments to Section 440 of AEDPA, Pub. L. No. 104-132, 110 Stat. 1276, effective as if included in the original enactment of AEDPA. See p. 87a, *infra*.

"(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i), shall not be subject to review by any court."

* * * * *

(d) CLASSES OF EXCLUDABLE ALIENS.—Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended—

(1) by striking "The first sentence of this" and inserting "This"; and

(2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)."

9. Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-597 (Sept. 30, 1996) provides:

REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.

10. Section 306 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996),[3] provides in pertinent part:

APPEALS FROM ORDERS OF REMOVAL (NEW SECTION 242).

* * * * *

(b) REPEAL OF SECTION 106.—Section 106 (8 U.S.C. 1105a) is repealed.

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

* * * * *

(d) TECHNICAL AMENDMENT.—Effective as if included in the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132), subsections (a), (c), (d), (g), and (h) of section 440 of such Act are amended by striking

---

[3] Public Law No. 104-302, 110 Stat. 3656 (Oct. 11, 1996) made certain technical amendments to Sections 306 and 309 of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607, 3009-625, effective as if enacted on the original date of enactment of IIRIRA.

"any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)" and inserting "any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)".

11. Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996), provides in pertinent part:

EFFECTIVE DATES; TRANSITION.

(a) IN GENERAL.—Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

* * * * *

(c) TRANSITION FOR ALIENS IN PROCEEDINGS.—

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date—

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

* * * * *

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW.—In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary—

* * * * *

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

12. Section 2241 of Title 28, United States Code, provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> * * * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> * * * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

APPENDIX I

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Interim Decision #3289

In re Bartolome Jhonny Soriano, Respondent

File A39 186 067 - Napanoch

Decided June 27, 1996

Before: Board En Banc: SCHMIDT, Chairman; HEILMAN, HOLMES, VILLAGELIU, MATHON, and GUENDELSBERGER, Board Members. Concurring and Dissenting Opinion: ROSENBERG, Board Member. Dissenting Opinion: VACCA, Board Member, joined by DUNNE, Vice Chairman; HURWITZ, FILPPU, and COLE, Board Members.

HEILMAN, Board Member:

In a decision dated October 12, 1995, an Immigration Judge found the respondent deportable as charged, denied his application for a waiver of inadmissibility pursuant to section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994), and ordered him deported from the United States to the Dominican Republic. The respondent appealed from that decision

on October 23, 1995. Subsequent to the respondent's appeal, Congress amended section 212(c) of the Act, and the Immigration and Naturalization Service has now filed a supplemental brief in response to the respondent's argument, asserting that the recent legislative amendments preclude the respondent from demonstrating his continuing eligibility for section 212(c) relief.[1] Thus, we are faced with the issue regarding the effective date of section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 ("AEDPA"). We find the respondent eligible for section 212(c) relief, but will deny his appeal as a matter of discretion.

I. PROCEDURAL HISTORY

The respondent is a native and citizen of the Dominican Republic. He entered the United States on March 28, 1985, as a lawful permanent resident. On May 20, 1992, the respondent was convicted under the law of the State of New York of the offense of attempted criminal sale of a controlled substance. Based on this conviction, the Service initiated deportation proceedings against the respondent with the issuance of an Order to Show Cause and Notice of Hearing (Form I-221) dated June 3, 1994. On April 28, 1995, the respondent filed an Application for Advance Permission to Return to Unrelinquished Domicile (Form I-191) pursuant to section 212(c) of the Act. By order dated October 12, 1995, the Immigration Judge found that the respondent was eligible for relief under section 212(c) of the Act, but denied that application in the exercise of

---

[1] We acknowledge the contribution of amici in the briefing of this issue to the Board.

discretion. On appeal, the respondent argues that the Immigration Judge erred in the exercise of that discretion.

II. APPLICABLE LAW

Prior to considering the respondent's appeal of the Immigration Judge's discretionary determination, this Board must first address the Service's contention that the recent amendments to section 212(c) of the Act statutorily bar the Board from considering the merits of the respondent's appeal from his section 212(c) application. We note initially that the respondent was clearly eligible for such relief under the law in effect at the time the Immigration Judge rendered his decision.[2]

However, during the pendency of the respondent's appeal from the Immigration Judge's discretionary denial of his application, Congress amended section 212(c) of the Act to read as follows:

---

[2] Until April 24, 1996, section 212(c) of the Act read as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of section (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion invested in [her] under section 211(b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of section (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion invested in [her] under section 211(b). *This section shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).*

Section 440(d) of the AEDPA, 110 Stat. at 1277 (emphasis added).

The respondent, deportable by reason of having committed an offense covered by sections 241(a)(2)(A)(iii) and (B) of the Act, falls within the last sentence of the AEDPA amendment. Thus, we must decide whether Congress intended the respondent to remain eligible for section 212(c) relief after April 24, 1996.

III. EFFECTIVE DATE

Congress did not incorporate an express provision regarding the effective date of section 440(d) of the AEDPA. Initially, then, we must discern the date on which this section of law became effective, and, if effective immediately, whether it applies to those aliens

already in proceedings as of April 24, 1996. If it does so apply to those aliens in proceedings, we must further determine whether the amendment applies to those aliens who filed their section 212(c) applications by April 24, 1996. In resolving these issues of the AEDPA's temporal applicability, we first look to the language of the statute itself. We begin by noting that the paramount index of congressional intent is the plain meaning of the words used in the statute taken as a whole. *See Matter of Grinberg*, 20 I&N Dec. 911 (BIA 1994) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987)); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (stating that in ascertaining the "plain meaning" of a statute, one "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole").

A. SECTION 440(D) AND PENDING PROCEEDINGS

Initially, we find persuasive evidence to conclude that Congress intended section 440(d) to apply immediately, regardless of whether the Service had placed an alien in proceedings by April 24, 1996. Both general statutory construction and an examination of Congress' inclusion of other effective dates in the AEDPA lead us to this result. General rules of statutory construction hold that the lack of an effective date for legislation indicates that the law should be effective on the date of passage. *See generally* 2 C. Sands, *Sutherland Statutory Construction* § 33.08 (4th ed. 1973). We find no obstacle to the application of this rule in the language of the AEDPA; rather, we find such an interpretation buttressed by Congress' decision to expressly delay the effective date of other subsections of the AEDPA. For example, in section 414(b) of the AEDPA, 110 Stat. at

1270, Congress expressly provided that this amendment "shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of [the AEDPA]." Similarly, in section 442 of the AEDPA, 110 Stat. at 1280, Congress amended section 242A(b) of the Act with regard to certain procedural aspects of deportation hearings and stated, in subsection 442(d), that those amendments "shall apply to all aliens against whom deportation proceedings are initiated after the date of the enactment of [the AEDPA]." The absence of similar language in section 440(d) supports the conclusion that Congress intended section 440(d) of the AEDPA to apply to aliens already in proceedings on April 24, 1996. These express declarations in other subsections of the AEDPA, in conjunction with Congress' silence in section 440(d) of the AEDPA, lead us to conclude that section 440(d) was effective immediately upon enactment and was not limited in applicability to those aliens whose proceedings were initiated after that date.

B. PENDING APPLICATIONS

However, this finding that section 440(d) of the AEDPA was effective immediately and not limited in application to those aliens brought into proceedings after April 24, 1996, does not finally resolve whether this respondent is barred from section 212(c) relief. There remains a subcategory of aliens, including the respondent, who already had applications for section 212(c) relief pending on April 24, 1996. Such aliens include those deportable aliens awaiting their section 212(c) merits hearings, as well as those aliens who have appealed the Immigration Judge's denial of their applications, and those who, having received a grant of

section 212(c) relief, are subject to a Service appeal of the Immigration Judge's decision. In determining congressional intent from the language and design of the AEDPA as a whole, we do not find that Congress' silence regarding the effective date of section 440(d) reflects an intent for the amendment to bar pending applications for section 212(c) waivers. In reaching this conclusion, we note that in section 413 of the AEDPA, which bars alien terrorists from most forms of relief from deportation, Congress expressly indicated that those bars to relief "shall take effect on the date of enactment of the AEDPA and shall apply to applications filed before, on, or after such date if final action has not been taken on them before such date." *See* section 413(g) of the AEDPA, 110 Stat. at 1269-70.

Another basic rule of statutory construction instructs that no provision of law should be so construed as to render a word or clause surplusage. See *Kungys v. United States*, 485 U.S. 759 (1988); *Colautti v. Franklin*, 439 U.S. 379 (1979). By adding the effective date found at section 413(g) of the AEDPA, Congress expressed its clear intent that section 413 of the AEDPA apply specifically to pending applications of alien terrorists. To construe this same intent by Congress' silence in section 440(d) of the AEDPA would require us to conclude that the "before, on, or after" language of section 413(g) of the AEDPA is unnecessary and irrelevant to whether that section applies to applications for asylum pending before the AEDPA's enactment. This we decline to conclude. Rather, we interpret Congress' omission of the "before, on, or after" language in section 440(d) to indicate its intent that aliens with applications pending on April 24, 1996, should not be statutorily

barred from section 212(c) relief by operation of the AEDPA.[3]

This conclusion is consistent with the approach to statutory interpretation set forth by the United States Supreme Court in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). In that case, the Supreme Court observed that when deciding whether changes in law should be applied to pending controversies in the absence of express congressional directive, "settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products, supra*, at 1497. By applying section 440(d) of the AEDPA to only those applications for section 212(c) relief filed on or after the date of the enactment of the AEDPA, the unique expectations of aliens whose applications for section 212(c) relief were pending prior to the enactment of the AEDPA are not disrupted. Such aliens demonstrated, with the filing of their pre-AEDPA applications, their expectation that although they were deportable under various provis-

---

[3] Similarly, we note that silence cannot reasonably be interpreted as evidencing a congressional intent to apply the new limitations in section 212(c) only to those aliens whose *convictions* for the relevant offenses occurred on or after the date of enactment of the AEDPA because Congress expressly stated that result in the AEDPA when such was its intent. *See* section 440(f) of the AEDPA, 110 Stat. at 1278 (stating that the amendments to the aggravated felony definition "apply to convictions entered on or after the date of enactment"). Moreover, as regards the issue of "settled expectations" discussed below, both the Board and the courts have noted that aliens cannot reasonably argue " 'that they somehow relied on the availability of a discretionary waiver of deportation when choosing to engage in [criminal] activity.' " *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 964 (BIA 1995) (quoting *DeOsorio v. United States INS*, 10 F.3d 1034, 1042 (4th Cir. 1993)).

ions of the Act, they would be able to present evidence of favorable social and humane considerations that might countervail evidence of their undesirability as lawful permanent residents. *See generally Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). The interpretative approach enunciated by the Supreme Court in *Landgraf* supports the conclusion that Congress did not intend by its silence to disrupt the expectations of those aliens whose applications for section 212(c) relief were pending on April 24, 1996.

Moreover, this conclusion is consistent with the approach adopted by Congress with its amendment of section 212(c) of the Act by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, in which a statutory 5-year aggravated felony bar to that relief was made applicable to aliens who applied after the date of the enactment of that 1990 amendment. *See Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 963 (BIA 1995).

C. APPLICABILITY TO RESPONDENT'S SECTION 212(C) REQUEST

The respondent applied for section 212(c) relief on April 28, 1995, prior to the April 24, 1996, enactment of the AEDPA. Accordingly, the bar to section 212(c) relief added by the amendment of that section by section 440(d) of the AEDPA does not apply to the respondent's application for relief. There is no question that the respondent is eligible for section 212(c) relief by the version of that section that was in effect prior to its amendment by section 440(d) of the AEDPA. That is, the respondent is not an alien convicted of an aggravated felony who served for such felony a term of imprisonment of at least 5 years. Thus, we find the

respondent eligible for relief under section 212(c) of the Act, and we proceed to the question of whether he merits that relief in the exercise of discretion.

III. DISCRETION

Notwithstanding the respondent's continued eligibility for a waiver of inadmissibility, we ultimately disagree with his appellate argument that the Immigration Judge erred in finding that he did not warrant a discretionary waiver pursuant to section 212(c) of the Act. As the Immigration Judge correctly noted, the respondent's attempted criminal sale of cocaine, in addition to his three other drug-related felonies, require a demonstration of outstanding or unusual equities before the respondent may receive a section 212(c) waiver of inadmissibility. *See Matter of Marin*, *supra*; *cf. Matter of Burbano*, 20 I&N Dec. 872, 879 (BIA 1994). We agree with the Immigration Judge that the respondent has failed to demonstrate such equities so that he may overcome his serious and recent drug trafficking crimes.

The respondent testified at the hearing that he has various family ties in the United States, including his mother, two siblings, and his United States citizen son. Moreover, the respondent explained that his son lives with his ex-wife, and that his family assists them financially. The respondent's mother and sister also testified on his behalf, and while we find it noteworthy that the respondent's family members attended the hearing, we do not find that this familial support alone rises to the level of outstanding or unusual. The respondent maintains various family ties in the Dominican Republic, including three daughters and four siblings. He arrived

in the United States only 10 years ago as a 25-year-old adult, and his employment during his residence in the United States has been sporadic.

Regarding his rehabilitative efforts, we note that the respondent testified that he has participated in a drug rehabilitation program while he has been incarcerated, and that after 18 years of drug use, he has maintained a drug-free lifestyle while in prison. Moreover, he testified that he has also received his GED while incarcerated, and he has recently strengthened his religious beliefs. We agree with the Immigration Judge that the respondent has demonstrated a willingness to continue his progress towards a drug-free and crime-free lifestyle and has taken steps towards rehabilitation. *See Matter of Arreguin*, Interim Decision 3247 (BIA 1995). However, considering these factors in conjunction with his family ties here and abroad, and his relatively short period of residence in the United States, we can not find that the respondent has demonstrated sufficient equities to overcome his four recent drug trafficking felonies. *Cf. Matter of Burbano*, *supra*. Accordingly, we will dismiss the respondent's appeal.

ORDER: The appeal is dismissed.

CONCURRING AND DISSENTING OPINION: Lory D. Rosenberg, Board Member

I respectfully concur in part and dissent in part.

Our decision today seeks to resolve the ambiguity presented by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 (enacted Apr. 24, 1996) ("AEDPA"), which amends the category of otherwise eligible lawful permanent resident aliens precluded from a waiver under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c)(1994).

The text of this section, as set forth by the majority, contains no express provision specifying an effective date for this amendment. The majority opinion properly recognizes that the fact that the AEDPA became law on April 24, 1996, is not dispositive of the effect of section 440(d) on an alien who "is deportable" on the grounds of deportability designated in that section.[1]

In essence, we hold that two related factors, traditional principles of statutory construction and Supreme

---

[1] This "ill-advised" provision of AEDPA is less than artfully drawn, having been enacted at the 11th hour as part of a bill ostensibly addressing the deportation of terrorists, not the deportation of "long-term legal residents." *See* President's Remarks on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 717 (Apr. 29, 1996). While section 440(d) refers to those "deportable by reason of having committed any criminal offense covered" by specified sections of the Immigration and Nationality Act, the only aliens so deportable are aliens who actually have been convicted of such offenses.

Court law interpreting the application of new statutes to pre-existing circumstances, must control the reach of this provision of the AEDPA. *See Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994). In the context of the appeal before us, it is necessary only to find, as the majority does, that the amendment does not apply to pending applications already filed by aliens in deportation proceedings. Thus, the respondent, who is deportable by reason of a conviction for a covered offense, remains eligible to have his pending application for a waiver of deportability under section 212(c) determined. For purposes of the scenario presented in this appeal, I concur.

I. THE SILENCE OF THE STATUTE

The silence of the statute with regard to its impact upon conduct and other events which already have taken place is significant. Nothing in the text or the legislative history of the AEDPA indicates that section 440(d) should be applied retroactively to pending cases or pre-amendment circumstances, or that this silence was due to an "accident of draftsmanship." *INS v. Phinpathya*, 464 U.S. 183, 191 (1984). By contrast, as the majority discusses, other sections of the AEDPA expressly address the effect of the particular provision on circumstances existing prior to its enactment. *See, e.g.*, section 413(g) of the AEDPA, 110 Stat. at 1269-70.

As recognized consistently by the Supreme Court, retroactivity is not favored in the law. *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988). A presumption against retroactivity generally is consistent with legislative and public expectations as a safeguard against unfairness. *Landgraf v. USI Film*

Products, *supra*, at 1501. This principle dates back to English common law, and even to Roman law. *See, e.g.*, *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806); *Dash v. Van Kleeck*, 7 Johns. 477, 502-03, 505 (N.Y. 1811) (the prince may enact a retrospective law as long as it is done expressly).[2]

In *Landgraf v. USI Film Products*, *supra*, the Supreme Court restated the principle that a statute shall not be given retroactive effect unless expressly provided by Congress. Specifically, the Supreme Court cautioned that "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct which occurred prior to that date." *Id.* at 1493.

To the extent that the majority decision is understood to mean either that the language in the statute as a whole is reconciled or that the *Landgraf* principles, discussed below, are properly observed only by finding that aliens who have *filed applications* for section 212(c) waivers by April 24, 1996, are not subject to section 440(d), I must differ. I write separately because I believe this Board's decision requires clarification on these points.

---

[2] *See Demelo v. Cobb*, No. 96-10903-REK (D. Mass. June 19, 1996) (discussing the specific language in the AEDPA relating to restrictions upon release from custody, and concluding that any interpretation of the Act applying it to offenses committed before April 24, 1996, (and convictions obtained before that date) would raise serious constitutional issues).

II. STATUTORY CONSTRUCTION AND RETROACTIVITY

As the agency implementing the statute, we recognize that a statutory construct involving silence in one provision but not another requires us to give effect to each provision. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (holding that the Board may not blur the distinctions between two related but separate statutory standards or reduce them into one); *Matter of Hou*, 20 I&N Dec. 513 (BIA 1992) (recognizing that Congress' use of different terminology in two sections of the statute requires the Board to give each independent effect).

In fact, this is precisely what was done by this Board in *Matter of A-A-*, 20 I&N Dec. 506 (BIA 1992), where we looked to the statutory language in various sections of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, in order to determine the applicability of the amendment of section 212(c) contained in that enactment. Although the section was silent as to its applicability to prior convictions, the express language of the statute made that amendment applicable to pending applications.[3]

---

[3] I note that our decision in *Matter of A-A-*, *supra*, also involved a situation, not present here, in which a retroactive application was necessary in order for the law to be effective. *See also Matter of Gomez-Giraldo*, 20 I&N Dec. 957 (BIA 1995) (finding 5-year incarceration bar would be delayed for 5 years if not applied to prior convictions).

Coupled with the principle enunciated by the Supreme Court in *Landgraf v. USI Film Products*, *supra*, at 1497, that when new provisions attach new legal consequences to prior events, "settled expectations should not be lightly disrupted" (unless Congress expressly states such an intent), these precepts militate in favor of adjudicating the respondent's waiver application according to the prior law. For the sake of brevity, I will refer to these two considerations—the requirement that we must interpret silence in a provision so as to give effect to the whole statute, and the doctrine of settled expectations as foreclosing the retroactive application of a new or amended statute to prior conduct—as the "*Landgraf* principles."

Semantic sparring over whether a new provision can be retroactive because it is being applied to an adjudication we are conducting in the present is not a useful exercise. Nonetheless, the dissent focuses on the application, which is a continuing one, rather than on past events and expectations which are settled, and avoids addressing the issue. The issue is whether the new provision *operates* retroactively. That is, does it affect the settled expectations of the parties, in this case, the respondent, as best described in the *Landgraf* principles.[4] Moreover, this Board previously has acknowledged that eliminating section 212(c) relief *does* have

---

[4] The predisposition against a retroactive construction of laws which operate to affect prior conduct is the principle that an individual should be able to act with reasonable certainty of the legal consequences. *See Chew Heong v. United States*, 112 U.S. 536, 559 (1884); *see also* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960).

retroactive effect. *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 963 (BIA 1995); *Matter of A-A-*, *supra*.

In this instance, even though the determination of eligibility for a waiver under section 212(c) may be prospective, the restriction in the amended provision has a retroactive operation or effect as it constitutes a new legal consequence which attaches, at a minimum, to any lawful permanent resident already subject to an Order To Show Cause or otherwise in the agency "pipeline." It is arguable that the legal consequences attach, in fact, to the conviction itself and even to the commission of the offense. Thus, as I discuss below, I believe that to find the amended provision applicable to all applications, as does the dissent, or only to already-filed and pending applications, as does the majority, falls short of the proper observance of the *Landgraf* principles.

A. *Landgraf* Principles and Board Precedent

Previously, the Board held that where new statutory provisions affecting eligibility for relief from deportation come into effect during the pendency of a deportation hearing or an administrative appeal to this Board, and there exists no statutory directive to the contrary, the new statutory provisions shall be applied to the application for relief before us, and the application may be denied on the basis of the statutory amendment. *Cf. Matter of U-M-*, 20 I&N Dec. 327 (BIA 1991), *aff'd*, 989 F.2d 1085 (9th Cir. 1993). Although the dissent clings to this position, it simply is not applicable here.

Since our decision in *Matter of U-M-*, *supra*, the United States Supreme Court issued its decision in

Landgraf v. USI Film Products, *supra*, in which it comprehensively discussed the issue of the application of statutory amendments to pending controversies. As I understand the dissent to assert that a silent statute is not only effective when signed by the President, but applies to all prior or pending events or conduct, I note that in *Landgraf*, the Supreme Court reconciled the apparent conflict between the presumption that "a court must apply the law in effect at the time it renders its decision," and the presumption against retroactivity. *Landgraf v. USI Film Products*, *supra*, at 1486-87 (citing *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974)).

In fact, in *Matter of Gomez-Giraldo*, *supra*, in which we last visited the impact of the Supreme Court's reasoning in *Landgraf v. USI Film Products*, *supra*, we held that the aggravated felony bar added to section 212(c) of the Act by a previous amendment implicated none of the concerns enunciated in *Landgraf*. We reasoned that, because that amendment, by its express terms, applied only to those applications for relief made on or after the effective date of the amendment, it would not disturb a lawful permanent resident's settled expectations that he or she could apply for and be granted a waiver under section 212(c). *Matter of Gomez-Giraldo*, *supra*, at 963-64. Our holding today, relating to an amendment with no express language, is entirely consistent with that decision and the reasoning underlying it.

B. *Landgraf* Principles and Factual Scenarios Under Section 440(d)

In *Landgraf v. USI Film Products*, *supra*, the Supreme Court set out a basic test to determine whether a statute would operate "retroactively" or "retrospectively" if applied to a case pending at the time of the statute's enactment. The Court stated that the question a body must ask is "whether the provision attaches new legal consequences to events completed before its enactment." *Id.* at 1499.

The first question presented is, which cases, if any, in the agency "pipeline" are affected? The majority limits its determination to persons who have already filed applications for relief under section 212(c). There remains an open question, however, whether the amendment applies to all potential candidates for the waiver already "in the pipeline."

Arguably, the "pipeline" could include various categories of individuals who are alleged to be deportable under the pertinent sections of the statute, and who are otherwise eligible for and require the grant of a waiver under section 212(c) in order not to be deported. Assuming the main, more comprehensive group to be putative candidates who have been identified by the Immigration and Naturalization Service as deportable aliens is consistent with the *Landgraf* principles.

This could encompass aliens who are the subject of a "detainer" placed against them during their incarceration for a criminal offense as the result of a request by the Service; it could include those served with an Order to Show Cause issued by the Service; and it could

include those subject to an Order to Show Cause against whom deportation proceedings have commenced as defined under the regulations. It could include those who have filed an application for a waiver under section 212(c) in proceedings before an Immigration Judge; those who are seeking to reopen to apply for 212(c) relief; and those who have received an order from an Immigration Judge from which an appeal has been taken to the Board and/or to the circuit courts of appeal.

In particular, this Board only recently recognized decisions of the United States Courts of Appeals for the Second, Seventh, and Ninth Circuits, which hold that the statutory language of section 212(c) makes plain that an alien may establish lawful domicile while in a status other than that of a permanent resident. *See Matter of Cazares*, Interim Decision 3262 (BIA 1996) (holding that a temporary resident under section 245A of the Act may accrue time towards 7-year lawful domicile requirement of section 212(c)). Further, the Fifth Circuit held specifically that temporary residents under both the legalization (section 245A) and special agricultural worker ("SAW") (section 210) provisions may accrue lawful domicile while in that status. *See White v. INS*, 75 F.3d 213 (5th Cir. 1996).

This Board has remanded appeals from decisions arising in those circuits to allow applications for section 212(c) to be filed and heard in the first instance or for a hearing on the merits when such was pretermitted by the Immigration Judge. The majority overlooks these cases; while not explicitly implicated in our decision today, the truncated interpretation of the majority leaves unresolved hundreds of cases of individuals who

we found to have been entitled to consideration at least under controlling circuit law, but whose applications were unlawfully pretermitted and foreclosed. In my view, such applicants are entitled to the opportunity to seek relief from deportation under section 212(c) whether or not they have a pending application on file. *See Snajder v. INS*, 29 F.3d 1203 (7th Cir. 1994).

The next question is whether the amendment applies to aliens convicted of any offense which would render them subject to deportation proceedings on charges referenced in section 212(c), as amended, and ineligible to apply for or be granted a waiver under that section. In the first published opinion on a provision of the AEDPA, the District Court of Massachusetts, construing section 440(c), posited that it was untenable that Congress could have intended that the terms of the provision apply other than to persons convicted on or after the April 24, 1996 effective date. *Demelo v. Cobb*, No. 96-10903-REK (D. Mass. June 19, 1996). Section 440(c) refers to custody requirements applicable to the exact same categories of aliens affected by the operation of section 440(d).

One difference between the language in section 440(c) and that in section 440(d) is that the plain language of section 440(c) amends section 242(a)(2) of the Act, which mandates the Attorney General to take into custody any alien "*convicted of* [the same offenses specified in amended section 212(c)] . . . upon release of the alien from incarceration." (Emphasis added.) By contrast, the language of section 440(d) amends section 212(c) to read that the provision "shall not apply to an alien who *is deportable* by reason of having committed an offense." (Emphasis added.)

As the majority states, silence cannot reasonably be interpreted as supporting a "settled expectation" of being able to engage in criminal activity without consequences. However, I part ways with the majority when they declare that individuals may not have "settled expectations" with regard to an opportunity to seek a section 212(c) waiver that affects a plea of guilty or other trial or appellate choices.

III. LANDGRAF PRINCIPLES AND MANIFEST INJUSTICE

In the absence of specific language, the reach of the statute depends upon settled expectations. This doctrine is different from, but enhanced by, that of "manifest injustice."

The human consequences of the AEDPA which are implicated by the legal question before us are compelling. I believe this is especially important to note in light of the fact that our decision today denies the requested relief from deportation. Waivers under section 212(c) are not easily obtained; to the contrary, they are perhaps the most difficult and hard won of any forms of discretionary relief over which we exercise our jurisdiction. At stake is an alien's ability to remain in this country as a permanent resident, which is determined by balancing the good of society as a whole against the individual social and humane considerations that may pertain to any one case. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

Such waiver applications are individual and fact bound, and they are properly left to the exercise of discretion by Immigration Judges in individual cases,

subject to the de novo review authority of this Board. While applicants for section 212(c) waivers share the adverse factor of having been convicted of a criminal or other immigration offense or offenses which renders them subject to deportation, they are as individual as humans can be and as human experience allows.

Applicants for waivers under section 212(c), until now, have included persons convicted of a single, possibly victimless or nonviolent crime or crimes over a discrete period of their stay in the United States, who have acknowledged their wrongdoing and changed their behavior. They include individuals who came to this country with their families as infants; adults who have neither spoken their native language nor been in their native country since childhood; fathers, mothers, and single parents of United States citizen children; businessmen and women who employ United States citizen workers in legitimate occupations; caretakers of elderly United States citizen parents; victims of domestic violence; and refugees. While they are not free of responsibility for their mistakes, they have paid, often dearly, for their transgressions in the criminal justice system, and they cannot all be said to unilaterally present a menace or threat to our society such that deportation is warranted.

I find compelling policy and practical reasons to go beyond such a limited interpretation as the one the majority proposes in this case. All of these people, and no doubt many others, had settled expectations to which they conformed their conduct. *Landgraf v. USA Film Products*, *supra*, at 1497, instructs that those "settled expectations should not be lightly disrupted." "Retroactive application of laws is undesirable where

advance notice of the change in the law would motivate a change in an individual's behavior or conduct." *Griffon v. United States Dept. of Health and Human Services*, 802 F.2d 146, 153 (5th Cir. 1986) (citing *Alexander v. Robinson*, 756 F.2d 1153 (5th Cir. 1985)).

Statutes may not be applied retroactively where doing so would result in manifest injustice to those affected. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974). Here, manifest injustice would result to a significant number of legal residents, because, while otherwise eligible, their right to apply for a section 212(c) waiver will have been infringed. Moreover, I note the inevitable disparity in treatment accorded different individuals that would result, because otherwise eligible legal residents requiring a waiver have no control over when proceedings are commenced or how quickly or in what order hearings and appeals are set or adjudicated. *See Dion v. Secretary of Health and Human Services*, 823 F.2d 669, 672 (1st Cir. 1987) (finding a retroactive application inappropriate where a disparity among applicants would result).

Further, although no legal resident has the absolute right to be granted section 212(c) relief, eligible residents do have a vested right to apply and be considered for such relief. *See, e.g., Rabiu v. INS*, 41 F.3d 879 (2d Cir. 1994); *Snajder v. INS*, *supra*, at 1207-08; *Batanic v. INS*, 12 F.3d 662, 667 (7th Cir. 1993). For example, a respondent's counsel might have been ineffective in failing to file a section 212(c) application on behalf of an otherwise eligible respondent. *Rabiu v. INS*, *supra*. The Service may have violated a regulation denying the respondent the right to counsel. *Snajder v. INS*, *supra*; *Batanic v. INS*, *supra*. The

Immigration Judge might have wrongfully denied the respondent's motion for a change in venue that prejudiced his or her rights to a fair hearing. *Campos v. Nail*, 43 F.3d 1285 (9th Cir. 1994). The Immigration Judge might have failed to notify the respondent of relief for which he or she was apparently eligible. *Bui v. INS*, 76 F.3d 268 (9th Cir. 1996).

In any of these cases, I believe due process and fundamental fairness would dictate that we accept the case for consideration of section 212(c) relief, nunc pro tunc. Even while acknowledging the absence of statutory authority to do so, this Board has long granted nunc pro tunc relief to cure various defects in proceedings, if such treatment would dispose of a case. *Matter of Garcia*, Interim Decision 3268 (BIA 1996); *see also Matter of Lok*, 18 I&N Dec. 101, 107 (BIA 1981), *aff'd*, 681 F.2d 107 (2d Cir. 1982).

IV. CONCLUSION

I would find that section 440(d) of the AEDPA operates retroactively if applied not only to pending section 212(c) applications, but to other prior events. It would attach a new legal consequence to both a pre-amendment charge or finding of deportability under most of the provisions found at section 241(a)(2) of the Act. Prior to the amendment, a person entering into plea agreements or found deportable under those sections who were otherwise eligible could rely upon an opportunity to present evidence of social and humane considerations to countervail evidence of their undesirability as a permanent resident in order to demonstrate that the granting of section 212(c) relief appeared to be in the best interest of the United States. *Matter of*

Marin, *supra*, at 584. To upset those settled expectations by retroactively applying section 440(d) of the AEDPA, without the express directive of Congress requiring such an application, attaches a new legal consequence to conduct and events already completed by April 24, 1996. It would require us to disregard the concerns articulated by the Supreme Court in *Landgraf v. USI Film Products*, *supra*, and, in my view, would contravene both practical considerations and fundamental fairness.

DISSENTING OPINION:

Fred W. Vacca, Board Member, in which Mary Maguire Dunne, Vice Chairman, Gerald S. Hurwitz, Lauri S. Filppu, and Patricia A. Cole, Board Members, joined.

I respectfully dissent.

As stated by the majority, the issue before us is to determine the effective date of section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 (enacted Apr. 24, 1996) ("AEDPA"), and if effective on enactment, to decide which aliens who were eligible for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994), are affected by the amendment. I agree with the majority's finding that general principles of statutory construction lead directly to the conclusion that the amendment took effect on the date of enactment, absent the inclusion of an alternative effective date. Therefore section 440(d) of the AEDPA applies immediately to aliens in proceedings. *See Matter of U-M-*, 20 I&N Dec. 327, 332 (BIA 1991), *aff'd*, 989 F.2d 1085 (9th Cir. 1993).

However, I part company with the remainder of the analysis employed by the majority with respect to the applicability of section 440(d) to pending applications for section 212(c) relief. I do not view the fact that Congress specifically barred pending applications for relief by alien terrorists, as set forth in section 413(g) of the AEDPA, 110 Stat. at 1269-70, to in any way dictate or even guide us in determining whether section 440(d) applies to pending section 212(c) applications. For com-

parison purposes, I cannot determine the relevant effective date from looking at the four corners of the statute to the extent that Congress employed a wide variety of effective dates throughout the AEDPA, including prospective dates. I conclude that we are compelled to apply the provisions of section 440(d) to all pending section 212(c) applications.

This Board has consistently held that an application for relief from deportation is an ongoing application. *Matter of U-M-*, *supra*, at 332. The law that applies to the application is the law that exists at the time the final administrative decision is made. *Ziffrin v. United States*, 318 U.S. 73 (1943); *Matter of U-M-*, *supra*. A final administrative decision is made when the Board renders its decision in a case on appeal or certification, or where no appeal is taken, the right to appeal is waived, or the time allotted for appeal has expired. *See Matter of Lok*, 18 I&N Dec. 101 (BIA 1981), *aff'd*, 681 F.2d 107 (2d Cir.1982); 8 C.F.R. §§ 3.1(d)(2), 3.39 (1995).

This Board has also held that an application for section 212(c) relief filed in the context of deportation proceedings is equivalent to one made at the time an alien physically seeks admission into the United States. *Matter of A-A-*, 20 I&N Dec. 492, 502 n.22 (BIA 1992). Thus, in addition to qualifying as a person whose ongoing application for relief is subject to the existing law while under administrative review, the section 212(c) applicant also stands as an individual seeking entry to the United States, and his admissibility is determined on the basis of the facts and the law that exist at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992).

Furthermore, like the majority, I find additional support for my position in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). In *Landgraf* the Supreme Court stated:

> Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.

Id. at 1501.

Prospective relief has been defined by the Supreme Court as relief that operates in futuro, such as injunctive relief. *See American Steel Foundaries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921). This is in contrast to relief that operates "retroactively," such as damages and restitution. *See Hutto v. Finney*, 437 U.S. 678, 695 n. 24 (1978).

The Supreme Court has specifically held that statutory provisions that alter or affect forms of prospective relief are to be given effect upon the effective date of the legislation and should be applied to pending suits. *American Steel Foundries v. Tri-City Central Trades Council*, *supra*, at 201; *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464 (1921); *see also Hall v. Beals*, 396 U.S. 45 (1969). The Court has further held that parties to an action do not have vested rights to prior judgments conferring forms of prospective relief while their cases remain subject to appellate review. *See American Steel Foundries v. Tri-City Central Trades Council*, *supra*; *Duplex Co. v. Deering*, *supra*; *see also Raferty V. Smith Bell & Co.*, 257 U.S. 226 (1921).

Therefore, the ultimate right to prospective relief must be determined at the time of final administrative or judicial review.

Like injunctive relief, relief from deportation under section 212(c) of the Act is prospective in nature. *See Matter of K-L-*, 20 I&N Dec. 654, 658 (BIA 1993), *aff'd*, *Lee v. INS*, 12 F.3d 1102 (8th Cir. 1993) (referring to section 212(c) relief as prospective). Under the Immigration and Nationality Act, an alien's right to benefit from a waiver under section 212(c) can only be determined at the time of a hearing and upon a finding of excludability or deportability. Relief under section 212(c) therefore operates in futuro and does not nullify the fact that the alien, prior to applying for the waiver, was either excludable or deportable. Convictions alleged to be grounds for excludability or deportability do not disappear from an alien's record for immigration purposes upon a grant of relief under section 212(c). *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991). Hence, section 440(d) of the AEDPA amends a prospective form of relief and accordingly should be applied to all cases before this Board that remain subject to our appellate review. *See Landgraf v. USI Film Products*, *supra*; *American Steel Foundaries v. Tri-City Central Trades Council*, *supra*.

In light of the above case law, I am hard pressed to identify a basis for not applying section 440(d) of the AEDPA to all section 212(c) applications that are pending adjudication or review. The weight of authority clearly requires the Board to apply the new law, as the law was changed before a final administrative decision had been rendered. Furthermore, applying the amended section 212(c) provisions to pending appli-

cations does not offend any of the concerns underlying the retroactive operation of new statutes. *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 963 (BIA 1995).

Due to the nature of an application for a waiver under section 212(c), which is a continuous application until the conclusion of final administrative action, the effect of applying section 440(d) to pending applications is not retroactive. The only expectation an alien seeking to apply for section 212(c) waiver can rely on is that his application will be considered according to the law and facts as they stand at the time of final administrative review. In this context, it has long been true that an alien whose circumstances improve through the acquisition of an additional equity can move the Board to remand a pending matter for reconsideration of the discretionary aspect of his section 212(c) application in light of the new evidence. *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

Finally, I am concerned with the majority's preferred choice of the date of filing the section 212(c) application as being determinative of which applications can be evaluated under the pre-AEDPA statutory provisions. This effective date is not contained elsewhere in the AEDPA. Moreover, there are numerous other dates that could be selected, e.g., the date the crime giving rise to the ground of deportability occurred, the date of issuance of the Order to Show Cause, the date on which a finding of deportability was rendered, and the date of filing the application.

The majority claims support for its selected effective date in the Supreme Court's analysis in *Landgraf v. USI Film Products*, *supra*. However, under *Landgraf*,

we consider whether the new statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed" in determining whether a statute would have retroactive effect. *Id.* at 1505. These concerns of retroactivity, as enunciated in *Landgraf*, apply to the relevant past act. For section 440(d) purposes, this act occurs when the alien committed the crime that underlies the charge of deportability.

The majority appears to neglect this aspect of the retroactivity issue in its determination that applications filed by the date of enactment of the AEDPA are to be adjudicated under the former section 212(c) provisions so as not to unfairly disrupt the "unique expectations" of aliens at the time of filing. In my opinion, the expectations that an alien has at the time of filing an application under section 212(c) of the Act are largely irrelevant in determining whether section 440(d) of the AEDPA operates retroactively. Section 440(d) does not alter the rights an alien had at the time he committed the crime. Upon the commission of a criminal act that triggers deportability, an alien now stands, as he would have stood before, facing the prospect of criminal liability, as well as deportation from the United States. *See Scheidemann v. INS*, 83 F.3d 1517 (3d Cir. 1996).

In the face of congressional silence as to the effective date of section 440(d), the judicial default rules direct us to apply the law as of the date of enactment absent retroactive effect, which is not implicated here. The majority offers no persuasive analysis to support its

conclusion that the traditional default rules do not govern here. Accordingly, I dissent.

APPENDIX J

[logo omitted]

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C. 20530

IN RE: MATTER OF BARTOLOME JHONNY SORIANO

IN DEPORTATION PROCEEDINGS

ORDER NO.

Pursuant to 8 C.F.R. § 3.1(h)(iii), the Commissioner of the Immigration and Naturalization Service has referred to me for review the decision of the Board of Immigration Appeals (BIA) in Matter of Bartolome Jhonny Soriano (A39 186 067) (July 18, 1996). I hereby grant the Commissioner's request for review and vacate the opinion of the BIA pending my further determination.

September 12, 1996 /s/ JANET RENO
Date JANET RENO
Attorney General

APPENDIX K

[seal omitted]

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C. 20530

Matter of Soriano, BIA. Int. Dec. No. 3289 (1996)

IN DEPORTATION PROCEEDINGS

At the request of the Commissioner of Immigration and Naturalization, the Board of Immigration Appeals ("BIA") referred its decision in this matter pursuant to 8 C.F.R. § 3.1(h)(iii). Respondent Soriano, a native and citizen of the Dominican Republic, was admitted to the United States in 1985 as a lawful permanent resident alien. In 1992, he was convicted under New York law of the offense of an attempted sale of a controlled substance. Based on that conviction, the Immigration and Naturalization Service ("INS") instituted deportation proceedings against him in 1994.

In 1995, Respondent sought the relief of waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c). Section 212(c) grants the Attorney General discretionary authority to admit otherwise excludable permanent resident aliens. Although the statute expressly authorizes only a waiver of exclusion, courts have interpreted it to authorize relief in deportation proceedings as well. *See Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976); *De Osorio v. INS*, 10 F.3d 1034, 1039 (4th Cir. 1993). The

Immigration Judge found that the respondent was eligible for that relief, but, in the exercise of discretion, denied his application. *See Matter of Soriano*, File No. A39 186 067 (Executive Office for Immigration Review ("EOIR"), Office of the Immigration Judge, Oct. 12, 1995). Respondent appealed from that decision on October 23, 1995.

On April 24, 1996, while Respondent's appeal was pending, the President signed into law the Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). Section 440(d) of AEDPA amended INA § 212(c). The amendment provides in relevant part that section 212(c) relief shall not be available to aliens who are deportable by reason of having committed certain specified criminal offenses. Respondent's offense is among those specified.[1] Thus, a threshold issue on appeal was whether the amendment to section 212(c) applied to foreclose Respondent's application for relief from deportation.[2]

---

[1] The amendment provides in relevant part that section 212(c) relief shall not be available to an alien who "is deportable by reason of having committed any criminal offense covered in (INA) section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." 110 Stat. at 1277, as amended by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C., Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, 1996 U.S.C.C.A.N. Vol. 9B (110 Stat.) 1672. Respondent's offense is covered by sections 241(a)(2)(A)(iii) and (B) of the INA. *See* 8 U.S.C. § 1251.

[2] It is important to note as a threshold matter that deportation proceedings are civil actions, and, thus, the constitutional bars to retroactive application of penal legislation do not apply. *INS v.*

The BIA was unanimous in concluding that AEDPA § 440(d) was effective immediately upon enactment on April 24, 1996. The BIA was divided, however, as to whether AEDPA § 440(d) applied to applications for section 212(c) relief that were pending on the effective date of AEDPA. Six members of the BIA concluded that Congress did not intend that aliens who had applications pending on April 24, 1996, should be barred from seeking that relief. Accordingly, they found that Respondent continued to be eligible for waiver of inadmissibility.[3] Five members of the BIA dissented. They would have held that section 440(d) did apply to pending applications for section 212(c) relief. One member of the BIA concurred in part and dissented in part. That member agreed with the majority that AEDPA § 440(d) should not be applied to pending section 212(c) applications, but would also have declined to apply it to other cases, such as those of permanent resident aliens subject to an Order to Show Cause.

For the reasons stated below, I conclude that the amendment to INA § 212(c) made by AEDPA § 440(d)

Lopez-Mendoza, 468 U.S. 1032, 1038 (1984); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-95 (1952). Moreover, it is well settled that Congress may legislate to alter the immigration consequences of past criminal convictions or acts. *Lehman v. Carson*, 353 U.S. 685, 690 (1957); *Mulcahey v. Catalanotte*, 353 U.S. 692, 694 (1957).

[3] The majority agreed with the Immigration Judge's conclusions that Respondent's attempted criminal sale of cocaine, together with his three other drug-related felonies, required a demonstration of outstanding equities before he could receive a waiver of inadmissibility, and that Respondent had not made such a demonstration.

applies to proceedings such as Respondent's, in which an application for relief under section 212(c) was pending when AEDPA was signed into law.[4]

Analysis

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court sought to "reconcile two seemingly contradictory statements found in [the Court's] decisions concerning the effect of intervening changes in the law": that "'a court is to apply the law in effect at the time it renders its decision,'" and that "'[r]etroactivity is not favored in the law.'" *Id.* at 263-64 (citations omitted).

The Court set forth the method for analyzing the temporal reach of a statute:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not

---

[4] By Order dated September 12, 1996, I granted the request for review and vacated the opinion of the BIA in Matter of Bartolome Jhonny Soriano (A39 186 067).

> govern absent clear congressional intent favoring such a result.

Id. at 280.

In the present case, nothing in the language of the newly enacted statute, AEDPA § 440(d), specifies either that it is to be applied in pending deportation proceedings, or that it is not to be. Thus, the next task is to determine whether the statute would be given retroactive effect if applied in pending deportation proceedings. In this regard, the Court observed that "[w]hile statutory retroactivity has long been disfavored, deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Id.* at 268. A statute does not operate retroactively "merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-70 (citation and footnote omitted).

Of particular relevance here, the Court suggested that changes in the law affecting prospective relief, as well as those affecting jurisdiction and procedure, are generally not to be considered "retroactive." Specifically, the Court said:

> Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive. Thus, in *American Steel Foundries v. Tri-City Central Trades Coun-*

> *cil*, 257 U.S. 184 (1921), we held that § 20 of the Clayton Act, enacted while the case was pending on appeal, governed the propriety of injunctive relief against labor picketing. In remanding the suit for application of the intervening statute, we observed that "relief by injunction operates *in futuro*," and that the plaintiff had no "vested right" in the decree entered by the trial court.

Id. at 273-74.

Similarly, the three separately concurring Justices (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in the judgment), emphasized that intervening law was typically applied to pending applications for prospective relief:

> Courts traditionally withhold requested injunctions t' at are not authorized by then-current law, even if they were authorized at the time suit commenced and at the time the primary conduct sought to be enjoined was first engaged in. The reason, which has nothing to do with whether it is possible to have a vested right to prospective relief, is that "[o]bviously, this form of relief operated only *in futuro*." Since the purpose of prospective relief is to affect the future rather than to remedy the past, the relevant time for judging its retroactivity is the very moment at which it is ordered.

Id. at 293 (citations omitted).

Both the majority and concurring Justices identified another set of intervening statutes—those that confer or eliminate jurisdiction—that do not operate retroactively merely because they are applied to conduct arising before the statute's enactment. Justice Scalia

explained the Court's "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction . . . by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." *Landgraf*, 511 U.S. 286, 292-93 (Scalia, J. concurring).[5]

In summary, under *Landgraf*, a new statute does not have retroactive effect if it does not impair rights a party possessed when he or she acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. More specifically, an intervening statute that either alters jurisdiction or affects prospective injunctive relief generally does not raise retroactivity concerns, and, thus, presumptively is to be applied in pending cases. As discussed below, the application of AEDPA § 440(d) to pending applications for section 212(c) relief does not impair a right, increase a liability, or impose new duties on criminal aliens. The consequences of Respondent's

---

[5] The single dissenting Justice in *Landgraf* was of the opinion that the presumption against retroactive legislation, "which serves to protect settled expectations," and which "is grounded in a respect for vested rights," "need not be applied to remedial legislation . . . that does not proscribe any conduct that was previously legal." *Id.* at 296-97 (Blackmun, J., dissenting) (citing *Sampeyreac v. United States*, 32 U.S. (7 Pet.) 222, 238 (1833) ("Almost every law, by providing a new remedy, affects and operates upon causes of action existing at the time the law is passed") and *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir.) ("Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known."), *cert. denied*, 449 U.S. 905 (1980)).

conduct remain the same before and after the passage of AEDPA: criminal sanctions and deportation. AEDPA § [440(d)] is best understood as Congress's withdrawal of the Attorney General's authority to grant prospective relief. Thus, the statute alters both jurisdiction and the availability of future relief, and should be applied to pending applications for relief.[6]

The relief sought in a section 212(c) application, waiver of inadmissibility, is prospective in nature. A successful applicant for relief under section 212(c) will not, as a matter of the sovereign's discretion, be deported from the country, even though his or her past criminal convictions would otherwise lead to deportation. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("The deportation hearing looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may

---

[6] One formulation articulated in *Landgraf* for determining whether a statute operates retroactively—"whether [it] attaches new legal consequences to events completed before its enactment"—could be interpreted as compelling the conclusion that AEDPA § [440(d)] should not be applied to pending applications for section 212(c) relief. *Id.* at 269-70. Because the statute eliminates eligibility for a previously available form of relief from the immigration consequences of a prior criminal conviction, it could be argued that it attaches new legal consequence to a prior event. Elimination of a form of relief in this context, however, is not the same as the attachment of new legal consequences in the sense that the Court meant in *Landgraf*. If it were, most cases in the three categories that the Court identified as not constituting retroactive application when applied to past events—statutes that alter jurisdiction, procedural rules, and statutes affecting the availability of prospective injunctive relief—would also have to be understood as attaching new legal consequences to prior events and, hence, constituting retroactive application.

shed light on the respondent's right to remain."); *De Osorio v. INS*, 10 F.3d at 1042 (holding that an amendment barring applications for waivers of deportations filed after the effective date of the amendment to 212(c) is not made retroactive merely because it applies to convictions for aggravated felonies before that time: "The past aggravated felony conviction is only the prerequisite for the prospective denial of discretionary relief. . . . Congress did not attach additional consequences, but merely withdrew a previously available form of discretionary relief.").

Moreover, Congress's modification of section 212(c) operates to eliminate the discretionary authority of the Attorney General to grant relief in certain cases, and, thus, its effect is to remove jurisdiction. As the Solicitor General argued in the brief of the United States to the Supreme Court in *INS v. Elramly*, 73 F.3d 220 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1260, and *vacated*, 117 S. Ct. 31 (1996), a case raising the issue whether AEDPA divested the Attorney General of authority to grant section 212(c) relief in pending cases, "[j]ust as new 'jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties,"' *Landgraf*, 511 U.S. at 274, section 212(c) speaks to the power of the Attorney General to waive deportation, not to any right of an alien to such relief." Supplemental Brief for the Petitioner at 18. The majority opinion in *Landgraf* explains the practice of applying new jurisdictional statutes to pending cases by the fact that "a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Id.* at 274 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). Here, in contrast to the cases cited by the

Court, there is no alternative tribunal to which the criminal alien may petition. Even assuming that the lack of an alternative tribunal would be relevant to retroactivity analysis where a substantive right is at stake, eligibility for a congressionally created form of purely discretionary relief from the immigration consequences of a prior criminal conviction cannot properly be characterized as a substantive right.[7]

The Third Circuit's discussion of the application of an earlier amendment to section 212(c) to make an applicant ineligible for relief based on a prior criminal conviction applies equally here:

> In this case, the consequences of petitioner's criminal conduct were clear at the time of that conduct and they remain unchanged today. He was subject to possible criminal sanctions and deportation. The only relevant change in the law relates to the permissible scope of the Attorney General's discretion to grant relief from one of those consequences. Like statutes altering the standards for injunctive relief, this change has only a prospective impact. It is not designed to remedy the past but only to affect petitioner's future status with respect to the legality of his presence in the United States. Like statutes constricting the jurisdiction of a

---

[7] The concurring opinion further notes that while there may sometimes be an alternative forum, there is not always one, and even where there is, it may deny relief for some collateral reason such as a statute of limitations bar. "Our jurisdiction cases are explained, I think, by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." *Landgraf*, 511 U.S. at 293 (Scalia, J. concurring).

> judicial body, these changes speak only to the power of a public agency. . . . Given the facts that petitioner's pre-1987 conduct clearly subjected him to deportation as well as criminal sanctions, and that § 212(c), as it then existed, offered relief from the former only at the unfettered discretion of the Attorney General, petitioner does not, and could not, contend that his conduct was undertaken in reliance on the then current version of § 212(c).

Scheidemann v. INS, 83 F.3d 1517, 1523 (3rd Cir. 1996).

The Seventh Circuit has expressed a contrary view in *Reyes-Hernandez v. INS*, 89 F.3d 490 (7th Cir. 1996), at least with respect to a narrow category of cases. In that case the petitioner had conceded deportability before the enactment of AEDPA, when he was still eligible for section 212(c) relief. The court speculated that had the petitioner known that this relief would no longer be available to him, he might have contested deportability.

> Considering the fell consequences of deportation, especially in cases of exceptional hardship, which are precisely the cases in which an appeal to section 212(c) would have a chance of success, we think it unlikely that Congress intended to mousetrap aliens into conceding deportability by holding out to them the hope of relief under section 212(c) only to dash that hope after they had conceded deportability. No such ignoble intention appears in the statute. Its absence is determinative under *Landgraf* because to make the concession of deportability a bar to relief under section 212(c) would be to attach a new legal

> consequence to the concession, an event that occurred before the new law came into existence.

Id. at 492-93. The court held that section 440(d) of AEDPA does not apply to cases in which deportability was conceded before AEDPA became law, "provided that the applicant for discretionary relief would have had at least a colorable defense to deportability; for if not, he lost nothing by conceding deportability." *Id.* at 493.[8]

Amici curiae in the current case also emphasized the reliance aliens may have placed on the availability of section 212(c) relief. Amici argue that aliens may rely on the possibility of obtaining section 212(c) relief not only when deciding whether to contest deportability, but also when deciding whether to litigate their criminal liability or enter into a plea agreement. It is true that the majority opinion in *Landgraf* notes that "familiar considerations of fair notice, reasonable reliance, and settled expectations" are factors offering "sound guidance" in "hard cases." *Landgraf*, 511 U.S. at 270. However, the Court states expressly that a statute does not operate retroactively merely because it "upsets expectations based in prior law." *Landgraf*, 511 U.S. at 270.

In any event, it is difficult to see how the possibility of obtaining section 212(c) relief would affect an alien's decision whether to concede or contest deportability. First, the criteria for determining whether someone is

---

[8] The Seventh Circuit has confirmed that *Reyes-Hernandez* applies only in cases where the petitioner conceded deportability and had a colorable defense to deportability. *Arevalo-Lopez v. INS*, No. 96-1754, 1997 WL 1898, at *2 (7th Cir., Jan. 3, 1997).

deportable as a criminal alien are specific and fixed, and the grounds for challenging deportability are quite narrow. *See Rabiu v. INS*, 41 F.3d 879, 881 (2d Cir. 1994) (record of conviction sufficient to overcome alien's challenge to deportability); *Ortega de Robles v. INS*, 58 F.3d 1355, 1358 (9th Cir. 1995) (criminal convictions may not be collaterally challenged in deportation proceeding as ground for contesting deportability). Second, an alien need not choose between contesting deportability and seeking section 212(c) relief; an alien may pursue both.

It seems more plausible that an alien may enter a plea bargain hoping to obtain relief from deportation, but even so, the alien could not have reasonably relied upon the availability of that relief. For the past forty years, the law has been settled that Congress may legislate to alter the immigration consequences of past criminal convictions or acts. Moreover, as the Supreme Court recently unanimously reaffirmed in the context of analyzing a similar provision conferring discretionary authority upon the Attorney General, "suspension of deportation [is]. . . 'an act of grace' which is accorded pursuant to her 'unfettered discretion' and is similar to 'a judge's power to suspend the execution of a sentence, or the President's to pardon a convict.'" *INS v. Yueh-Shaio Yang*, 117 S. Ct. 350, 352-53 (1996) (citations omitted). Therefore, a criminal alien could not reasonably rely on the availability of section 212(c) relief in determining whether to plead guilty to a criminal offense or in determining whether to concede deportability.

Accordingly, the application of AEDPA § 440(d) to section 212(c) applications pending before the EOIR

would not be retroactive. However, to eliminate even the remote possibility that an alien who had a colorable defense to deportability may have conceded deportability in reliance on the availability of section 212(c) relief, I direct the EOIR to reopen cases upon petition by an alien who conceded deportability before the effective date of AEDPA for the limited purpose of permitting him or her to contest deportability.

CONCLUSION

For the foregoing reasons, AEDPA § 440(d) should be applied to INA § 212(c) cases pending before the EOIR on the effective date of AEDPA. EOIR shall reopen cases upon petition by an alien who conceded deportability before April 24, 1996, the effective date of AEDPA, for the limited purpose of permitting the alien to contest deportability.

Date: February 21, 1997 /s/ JANET RENO
JANET RENO
Attorney General